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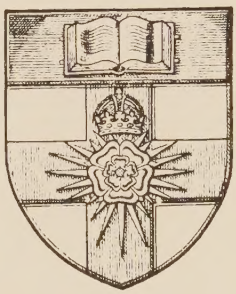

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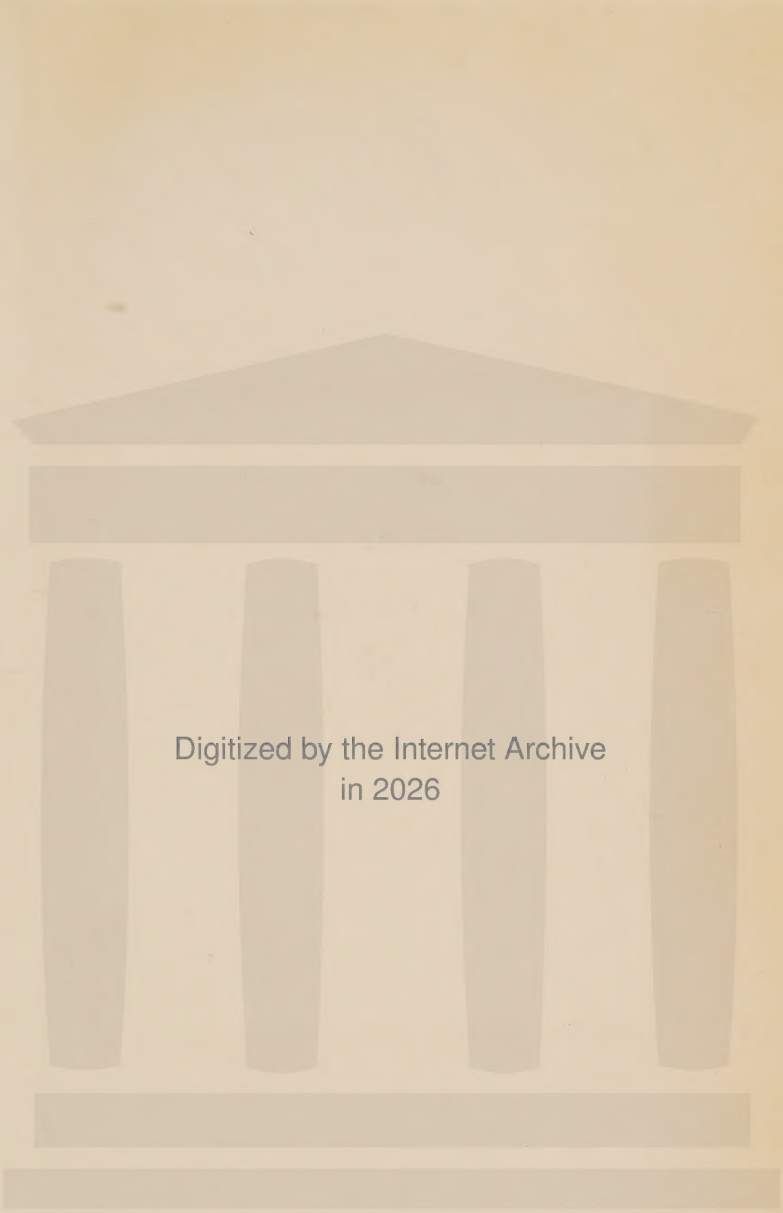

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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

In re WATKINS' SETTLEMENT.
WILLS *v.* SPENCE.

[1910 W. 256.]

C. A.
1910
Nov. 4.

Settlement—Construction—Annuity—Income or Corpus—Annuity expressed to be payable out of Income—Gift over "subject thereto."

By a marriage settlement certain property was conveyed by the husband to trustees upon trust, after his death, out of the income of the trust premises to pay a clear annual sum of a given amount to his widow for life and "subject thereto" upon certain trusts over:—

Held, that the words "subject thereto" meant subject to the annuity, and, consequently, that the annuity was a charge on the corpus.

In re Bigge, [1907] 1 Ch. 714, overruled.

APPEAL from a decision of Swinfen Eady J.

By a settlement dated November 4, 1872, made on the marriage of David Rees Watkins and Alice Lucy Ivimy certain real estate and certain funds and securities (thereinafter called the trust fund) were conveyed and transferred by the husband to the trustees of the settlement upon trust after the death of the husband to hold the said hereditaments and premises thereby granted and conveyed and the said trust fund and the rents, profits, and income of the said real and personal estate respectively in trust that they the said trustees should "out of the rents and profits of the said hereditaments and premises and the income of the said trust fund pay to the said A. L.

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WATKINS' SETTLEMENT, *In re.* WILLS *v.* SPENCE.

Ivimy the clear yearly sum of 400*l.* per annum " payable at the times and in the manner therein mentioned " during the natural life of the said Alice Lucy Ivimy And subject thereto " if there should be any children of the marriage upon trusts therein mentioned, and if there should be no children of the marriage, then " Upon trust after paying out of the rents and profits of the said real estate and the income of the said trust fund and personal estate to the said A. L. Ivimy the said clear yearly sum of 400*l.* during her life in manner and at the times aforesaid and subject thereto In trust for the said D. R. Watkins his heirs executors administrators and assigns according to the nature and quality thereof respectively."

The settlement also empowered the trustees at any time during the life of the husband with his consent in writing and after his death during the minority of any child of his at their discretion to dispose of either by way of sale or exchange all or any part of the hereditaments and premises thereby granted and conveyed, and also to concur with the persons entitled to dispose of the other undivided shares of any hereditaments and premises of which an undivided share was thereby granted and conveyed in making a partition of the same " free and discharged from all the uses trusts and powers then subsisting in or of the hereditaments so sold or disposed of by way of exchange or partition including the said annual sum of 400*l.* which shall thereupon become charged on the proceeds thereof as aforesaid."

D. R. Watkins made his will on January 5, 1873, and died in February, 1873. There was no issue of the marriage. The widow subsequently married C. J. Wills.

For some time past the income of the settled estate had been insufficient to pay the annuity of 400*l.* in full. Accordingly Mr. and Mrs. Wills took out an originating summons for the determination of the question whether according to the true construction of the settlement the annuity was not merely a continuing charge upon the income of the property comprised in the settlement, but was a charge on the corpus thereof.

Swinfen Eady J. held that the annuity was not a charge upon the corpus.

The plaintiffs appealed.

Hon. Frank Russell, K.C., and *S. R. Earle*, for the plaintiffs. It is admitted that this annuity is a continuing charge on the income, and the only question is whether it is a charge on the corpus. The words "subject thereto" in the gift over mean subject to the annuity, and the effect of these words is that, whatever the terms of the original gift, all that is given over is that which remains after the annuity has been satisfied: *Birch* v. *Sherratt* (1); *In re Howarth.* (2) This construction is fortified by the terms of the power of sale and exchange.

Whinney, for the trustees of the settlement.

Wright Taylor (*A. J. David, K.C.*, with him), for residuary legatees under the will of the husband, and *Owen Thompson*, for specific legatees. The annuity is expressed to be payable out of income, and the words "subject thereto" mean subject to the payment of the annuity out of the income: *In re Bigge.* (3) The words in *Birch* v. *Sherratt* (1) were "from and after the payment of the said annual sum and subject thereto" and are distinguishable from the words in this case, as they were held by the Court of Appeal distinguishable from the words used in the case of *In re Boden* (4), and it is clear from the comments of Vaughan Williams L.J. on *Birch* v. *Sherratt* (1) that he did not think the principle of that decision ought to be extended.

COZENS-HARDY M.R. This case seems to me to be absolutely covered by authority binding on us. It is a case in which by a marriage settlement the husband settled certain property upon trust after his death to pay to the widow out of the income of the trust premises an annuity of 400*l.* a year for her life and "subject thereto" upon trust for the children of the marriage —there were no children—and if there should be no children of the marriage then "upon trust after payment out of the rents and profits of the said real estate and the income of the said trust fund and personal estate to" the wife of "the said clear yearly sum of 400*l.* during her life in manner and at the times aforesaid and subject thereto" for the husband, his heirs, executors, administrators, and assigns.

(1) (1867) L. R. 2 Ch. 644.
(2) [1909] 2 Ch. 19.
(3) [1907] 1 Ch. 714.
(4) [1907] 1 Ch. 132.

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What does "subject thereto" mean? As I read the settlement it means subject to the annuity of 400*l.* If that be the true construction, it is absolutely settled by *Birch* v. *Sherratt* (1), which was in no way qualified by the Court of Appeal in *In re Boden* (2), and which has since been followed by this Court in *In re Howarth* (3), that these words "subject thereto" are not merely referential, but mean subject to the full and complete payment of the annuity, and that the effect of them is to make the annuity a charge on the corpus. Even if there were any ambiguity on the wording of the trusts to which I have referred, the power of sale in the later part of the settlement seems to me to remove all possibility of doubt. [His Lordship read the power of sale.] It is impossible to read the concluding words of that clause without seeing that the annuity was intended to be charged on corpus. For these reasons I think that the decision of the learned judge was wrong and that it must be declared that this annuity is a charge upon the corpus. Reference has been made to the decision of Neville J. in *In re Bigge.* (4) That case was decided before the decision of this Court in *In re Howarth* (3), and in my opinion it cannot be relied upon as an authority in future.

FLETCHER MOULTON L.J. I agree.

FARWELL L.J. I agree. The passage in Neville J.'s judgment in *In re Bigge* (5) in which he says "It seems to me that the words 'subject thereto' mean subject to the payment of the annuities out of the income" is obviously inconsistent with the decision of this Court in *In re Howarth* (3), and, as the case has found its way into the text-books, I think it ought not to be cited in the future as an authority.

Solicitors: *Rooks, Spiers, Wales & Ward; Sole, Turner & Knight; W. H. Martin & Co., for David & Evans, Cardiff; Helder, Roberts, Walton & Giles, for Morgan Griffiths, Son & Prosser, Carmarthen.*

(1) L. R. 2 Ch. 644.
(2) [1907] 1 Ch. 132.
(3) [1909] 2 Ch. 19.
(4) [1907] 1 Ch. 714.
(5) [1907] 1 Ch. 717.

H. B. H.

W. EDGE & SONS, LIMITED *v.* W. NICCOLLS & SONS, LIMITED.

C. A. 1910

Oct. 29; *Nov.* 5, 22.

[1910 W. 1379.]

Passing-off—Get-up—Useful Combination—Article in Common Use—Former Patent—Claim for Monopoly—Injunction.

The useful part of an article, as distinguished from an ornamental addition, cannot be regarded as part of the get-up of the article. The word "get-up" implies something extraneous to the article.

No length of exclusive user can entitle a trader to a monopoly in the manufacture and sale of a useful combination not protected by patent.

APPEAL from a decision of Swinfen Eady J.

The question raised by this appeal was whether a trader by long and exclusive user of an article of utility in combination with the "get-up" of his goods could claim a monopoly of this combination.

In 1884 W. Edge, the predecessor in title of the plaintiffs, took out a patent, No. 12,666 of 1884, which, as amended, claimed "wrapping or parcelling up soluble or unsoluble blue or other colour in a bag or cloth of fibrous substances provided with the attachment or handle C substantially as and for the purposes herein set forth." The body of the patent and the annexed drawing described clearly the nature of this so-called invention. Put shortly, it was a fibrous cloth bag with a stick inserted in the top as a receptacle for blue or other dye substances. This handle was claimed as an essential part of the invention, as a convenient method of immersing the contents in water without staining the fingers. W. Edge and his successors continuously used the receptacle described in the patent for the purposes of their blue.

In 1891 the validity of this patent was challenged and it was revoked, but the plaintiffs nevertheless continued to sell their laundry blue, tints, and dyes made up in these little bags with a stick protruding as before; their advertisements gave their

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names as the manufacturers, but on the articles themselves they did not put any name or other indication of origin. No other makers, however, had used this stick in their goods until 1909, when the defendants began to do so.

In November, 1909, the defendants had registered as their own design (design No. 552,733) a copy of the plaintiffs' method of putting up their goods, including the stick, and were using it in the sale of their own goods and issuing notices calling attention thereto as being their own registered design. The defendants put their own name on their goods.

The plaintiffs alleged that the presence of the stick had come to be a means by which the public recognized and were in the habit of asking for their goods, and they accordingly commenced the present action against the defendants and moved for an interim injunction to restrain the defendants from passing off, or attempting or enabling others to pass off, any laundry blue, tints, or dyes not of the plaintiffs' manufacture as or for the plaintiffs' goods by imitating the get-up of the plaintiffs' articles, or otherwise, and from supplying or attempting or enabling others to supply to persons asking for or ordering laundry blue, tints, or dyes, "with the stick in it," any such articles not the goods of the plaintiffs as or for the plaintiffs' goods.

The plaintiffs also moved to rectify the register by expunging the entry relating to the defendants' design No. 552,733. This application was not opposed.

Swinfen Eady J. held that the plaintiffs were entitled to an interim injunction as asked, except as to dyes, and to an order for rectification of the register.

The defendants appealed from the decision granting an interim injunction.

A. Grant, K.C., and *R. Frost*, for the appellants. After the expiration of a patent neither the patentee nor any one claiming through him can thereafter claim any monopoly in an article which is simply a reproduction of the patented article: the patentee must be taken to have dedicated to public use all that is contained in his specification and drawings; what the defendants have done is to copy the drawing, as they were entitled to do:

Linoleum Manufacturing Co. v. *Nairn* (1); *Reddaway* v. *Banham* (2); *Cellular Clothing Co.* v. *Maxton & Murray.* (3)

[FARWELL L.J. referred to *In re Formalin Hygienic Co.* (4)]

True, those cases dealt with the name of the article, but the principle applies.

The plaintiffs before they can obtain an injunction must shew that "the defendant is selling his own goods as the goods of another": *Birmingham Vinegar Brewery Co.* v. *Powell.* (5) The defendants put their name on their goods, the plaintiffs do not, thus telling the purchaser that the goods are the defendants' goods.

The stick or handle is not part of the get-up of the goods; it is utility—it is the useful part of the article as distinguished from a merely ornamental addition, and no length of exclusive user will entitle a trader to a monopoly in a useful combination. Anything that has value in its use cannot be considered as part of the get-up of the article: *Williams* v. *Bronnley* (6); to allow this would be to confer a right much more valuable than either a patent or a trade mark: *Cellular Clothing Co.* v. *Maxton & Murray.* (7) The injunction therefore ought not to have been granted.

Buckmaster, K.C., Hon. Frank Russell, K.C., and *J. G. Joseph*, for the respondents. If the question were not complicated by the former patent the plaintiffs would have a clear case of "passing off" by the defendants. *Linoleum Manufacturing Co.* v. *Nairn* (1) and that class of cases dealt only with the name of the article in question and are distinguishable. The present case is a question of "get-up" and passing off; and if it can be shewn that the defendants have deliberately copied the get-up of the plaintiffs' goods, then they are entitled to protection by means of an injunction: *In re Magnolia Metal Co.'s Trade Marks* (8); *Reddaway* v. *Banham.* (2) The mere fact that the defendants put their name on their goods is not necessarily a sufficient distinction: *Lever* v. *Goodwin.* (9) It is not necessary

(1) (1878) 7 Ch. D. 834, 837.
(2) [1896] A. C. 199, 214.
(3) [1899] A. C. 326, 344.
(4) (1900) 17 Rep. Pat. Cas. 486.
(5) [1897] A. C. 710, 711.
(6) (1909) 26 Rep. Pat. Cas. 765, 773.
(7) [1899] A. C. at p. 339.
(8) [1897] 2 Ch. 371.
(9) (1887) 36 Ch. D. 1.

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to shew that the persons purchasing the goods knew of the manufacturer by name: *Birmingham Vinegar Brewery Co.* v. *Powell.* (1) Every characteristic of the plaintiffs' get-up has been taken, the shape of the stick handle is exactly the same, and a different shape would have been just as useful; all these things tend to shew that the get-up was imitated on purpose to get an unfair benefit from the plaintiffs' reputation.

[COZENS-HARDY M.R. referred to *Schweppes, Ld.* v. *Gibbens.* (2)]

Because a small portion of the get-up is useful that ought not to be a reason why the whole combination can be appropriated by a rival. The parcel with this handle is novel and fulfils all the propositions laid down in *Williams* v. *Bronnley* (3), and the defendants have adopted them all.

[KENNEDY L.J. There is no evidence that any one has been deceived, and that is important: *Payton & Co.* v. *Snelling, Lampard & Co.* (4) The two articles are so exactly similar in their get-up that it is almost self-evident that a purchaser would be deceived.]

The plaintiffs do not claim a monopoly in the handle; they only claim the right to prevent other persons from using it, as part of the get-up, in such a way as to mislead purchasers into thinking that their goods are the goods of the plaintiffs, and the injunction can be limited to this extent.

A. Grant, K.C., in reply. The whole of the evidence claims a monopoly in a stick, and that the presence of a stick is essential, and does not claim the particular form of stick. The defendants call the goods by their own name which is placed on them; the shape and stick were those covered by the patent and are now common to every trader.

Cur. adv. vult.

Nov. 22. COZENS-HARDY M.R. This is an appeal from an order made on an interlocutory motion by Swinfen Eady J., who granted an injunction, the precise terms of which I must mention hereafter, in what is commonly called a passing-off action. The circumstances are peculiar, and it is necessary to consider with care the principles of law applicable to them.

(1) [1897] A. C. 715.
(2) (1905) 22 Rep. Pat. Cas. 601.
(3) 26 Rep. Pat. Cas. 765, 773.
(4) [1901] A. C. 308.

[Having stated the nature and revocation of the plaintiffs' patent as given above, his Lordship continued:—] It is plain that from the moment it was revoked it was competent to any one to make anduse the so-called patent article.

The plaintiffs have a very large trade, and they allege that their goods are known as "the blue with a stick in it." The defendants recently commenced to sell blue in a bag with a stick, which I take to be for all practical purposes identical with that described in the drawings annexed to the letters patent. The plaintiffs commenced an action in which they asserted that the stick attached to the neck of the bag is the distinguishing feature of their get-up, and they moved for an interlocutory injunction.

In support of this they filed no less than 183 affidavits in chief and nearly 100 in reply. I feel bound to say that this seems to me to be oppressive and a gross abuse of the practice of the Court, and an attempt by wealthy traders to overwhelm a comparatively poor rival trader. If evidence to that amount was necessary, which I do not for one moment believe, the case was one in which the judge ought to have been asked to grant, not an interlocutory injunction, but a speedy trial. However, the matter has been argued in the Court below and in this Court, and it becomes our duty to deal with it.

It is plain from the evidence that what the plaintiffs claim is the presence of a stick attached to the bag and not a stick of any particular pattern (see paragraph 3 of Mr. Edge's affidavit). The injunction granted by Swinfen Eady J. restrains the defendants until judgment or further order from passing off or attempting to pass off or enabling others to pass off any laundry blue or tints not of the manufacture or merchandise of the plaintiffs as or for the goods of the plaintiffs by imitating the get-up of the plaintiffs' laundry blue or tints or in any other way, and from supplying or attempting to supply or enabling others to supply to persons asking for or ordering laundry blue or tints "with the stick in it" any laundry blue or tints not being the goods of the plaintiffs as or for the goods of the plaintiffs. In my opinion this injunction cannot be supported.

I think it convenient to consider the matter first having regard to the patent of 1884, and secondly apart from the patent.

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It is clear law that a patentee, when his patent has expired or been revoked, has thrown open to the public the right to use the patent article, and that the fact of his user during the continuance of the patent does not entitle him to say that his user during the life of the patent has so far associated his name with the goods that no one else can thereafter use the lately patented article without deceiving the public or gaining the reputation of the patentee. This has been again and again laid down by the Court with reference to names or words—see *Linoleum Manufacturing Co.* v. *Nairn* (1)—and the principle seems to me to apply with at least equal, if not with greater, force to the article itself. It is impossible for the plaintiffs to assert that the stick is not a useful feature or that the form indicated in the drawings is not a convenient, and probably the best, form of stick to be used. The plaintiffs, however, now seek to say, "True, the bag is common to the trade, but the stick, or rather a stick, is distinctive of our goods." This is really equivalent to saying that the article lately patented cannot be used, and that the plaintiffs have acquired a monopoly with no limit in point of time. It will be observed that the injunction granted does not contain any words, such as are usually found, "without sufficiently distinguishing the defendants' goods from the goods of the plaintiffs."

It remains to consider the case apart from the patent of 1884. The plaintiffs say they are content to rely only upon user since 1891, and they contend that by the mere fact that they have put their goods for eighteen years in a common and convenient receptacle they have obtained a right to prevent any one else from so using the receptacle. I know no authority in support of this proposition. The defendants have simply reproduced the lately patented article and have attached their own name to it by a clear label. I do not think a useful part of an article, as distinguished from an ornamental addition, can be regarded as part of the get-up of the article. No length of exclusive user can entitle a man to a monopoly in the manufacture and sale of a useful combination not protected by patent. I agree with the observations of Fletcher Moulton L.J. in *Williams* v. *Bronnley*. (2)

(1) 7 Ch. D. 834. (2) 26 Rep. Pat. Cas. 773.

If, however, it can be regarded as part of the get-up I think the two things must be looked at in their entirety. The plaintiffs have never put their name on the article; the defendants put their name on, and in my opinion the defendants' article is not such that in the ordinary course of things a person with reasonable apprehension and with proper eyesight would be deceived. This is the test Lord Halsbury applied in *Schweppes, Ld.* v. *Gibbens*. (1)

The result is that, in my opinion, the appeal must be allowed. The order of Swinfen Eady J. must be discharged. The defendants' costs of the motion will be their costs in the action in any event, and the plaintiffs must pay the costs of the appeal. The action may possibly proceed to trial upon a distinct issue raised of alleged fraud, an issue which obviously ought not to be tried on affidavit evidence. Nothing that I have said is intended to prejudice any such question, but I desire to add that, in my opinion, it is not fraudulent in a trader merely to make and sell an article made by a rival trader with the intention to secure trade which otherwise would have been obtained by the rival.

FARWELL L.J. The plaintiffs claim in this case to have acquired the monopoly of the right to sell laundry blue in a bag with a stick in it, and they claim further the right to prevent other traders from selling to a purchaser who asks for "blue with the stick in it" any laundry blue except that of the plaintiffs. It is true that in this Court counsel attempted to limit the claim to the particular stick exhibited, which is a small bit of wood with a knob at the top, but with nothing distinctive about it, but the statement of claim and the evidence of the plaintiffs shew what their real claim was; it is enough to refer to paragraph 3 of their managing director's affidavit of June 11, 1910: "As a result the presence of a stick attached to the bags containing the plaintiff company's said laundry blue and tints is, and has for many years past been, associated with the plaintiff company's said laundry blue and tints, and has been relied on by the trade and the public as distinguishing the plaintiff company's said blue and tints from all others"; and the

(1) 22 Rep. Pat. Cas. 601.

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injunction granted by the learned judge gives full effect to this claim.

Before dealing with the general objections to such an injunction I will deal with the particular case arising out of patent No. 12,666 of 1884, taken out by William Edge, whose business is now vested in the plaintiffs, William Edge & Sons, Limited. The patent is clearly a combination patent, and the claim (omitting superfluous words) is wrapping up blue in a bag of fibrous substance, provided with a handle of wood, glass, &c., or other equivalent. No one appears to have questioned the validity of this preposterous patent until 1891, and William Edge enjoyed a monopoly of his so-called invention for seven years: when challenged it was of course at once revoked; this was in 1891. Both before and after that revocation William Edge and since their incorporation the present plaintiffs have wrapped up blue in small bags with a small wooden stick in it with a small knob at the top. This is one of the methods described in the specification, and is exactly as shewn in the drawing thereon, and would have been an infringement of the patent if made by a stranger and if the patent were valid and subsisting. Now a patent is granted on the footing that the grantee is the true and first inventor of some useful invention. In consequence of his service to the public by adding this invention to the common stock of knowledge, he is granted a monopoly of it for fourteen years, and on the expiration or sooner determination of that period it becomes common property. Neither the patentee nor any one claiming through him nor any one else can thereafter claim any monopoly in an article which is simply and solely a reproduction of the patented article. They may, of course, make up the article in a fantastic or distinctive manner, but they cannot claim any individual right in such article so far as it merely follows the directions of the patent. Take the instance that I put during the argument of roller skates, a picture of which will be found in *Plimpton* v. *Malcolmson*. (1) After the expiration of that patent no one could have obtained the exclusive right to make skates according to that design on the ground that he alone had made such skates for several years after such expiration, any more than he could have

(1) (1876) 3 Ch. D. 531, 535.

claimed a monopoly of the descriptive title "roller skates" under which the patentee had always sold them. The case is even stronger when the invention consists of a stick in a bag. The case is covered by authority, so far as the name is concerned: see *Linoleum Manufacturing Co.* v. *Nairn* (1), approved by Lord Davey in *Cellular Clothing Co.* v. *Maxton & Murray*, where he says (2): "On this point I adopt what was said in felicitous language by Fry L.J. in *Siegert* v. *Findlater*. (3) That is, my Lords, a matter of express decision in the case of a patent. If a man invents a new article and protects it by a patent, then during the term of the patent he has, of course, a legal monopoly; but when the patent expires all the world may make the article, and if they may make the article they may say that they are making the article, and for that purpose use the name which the patentee has attached to it during the time when he had the legal monopoly of the manufacture. But the same thing in principle must apply where a man has not taken out a patent, as in the present case, but has a virtual monopoly because other manufacturers, although they are entitled to do so, have not in fact commenced to make the article. He brings the article before the world, he gives it a name descriptive of the article: all the world may make the article, and all the world may tell the public what article it is they make, and for that purpose they may prima facie use the name by which the article is known in the market"; and in *Reddaway* v. *Banham* (4) Lord Herschell says: "Where a patentee attaches a particular name to the production he patents, that name becomes common property as descriptive of the patented article. It possesses, indeed, no other name. That name would necessarily be applied to it by all persons desiring to purchase the article. It is not descriptive of the production of a particular manufacturer, but of the article itself, by whomsoever it is manufactured. Indeed, there is no presumption that the patentee will manufacture it, even during the term of the patent: more often than not patented articles are manufactured by other persons by the licence of the patentee." It is said that this is confined to the

(1) 7 Ch. D. 834.
(2) [1899] A. C. 344.
(3) (1878) 7 Ch. D. 813.
(4) [1896] A. C. 214.

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name, but the reason for treating the name as common to all is because it represents and is the proper name for the article which is common to all: the shell and the kernel go together, the shell because it belongs to the kernel.

Then it is said that the patent was invalid and was actually revoked, but in my opinion that makes no difference. So far as the patentee is concerned, I adhere to what I said in *In re Formalin Hygienic Co.* (1), but I do not put it on any ground of estoppel; it is a matter of general law: subject to the patent, if and so long as it stands, and free from the patent when it has gone, the article forming the subject-matter of the patent and the name by which the inventor has called it are common property and cannot be monopolized by any one. No point was made by the appellants' counsel of the fact that the plaintiffs were not the patentees and were incorporated after the patent was revoked, but I have not overlooked it and have expressed my opinion on that footing accordingly. In my opinion, therefore, the plaintiffs' case fails on this ground.

But I am further of opinion that if there had been no patent the injunction granted cannot be supported. The article sold is as common as can well be imagined—a small piece of plain stick with a knob at the top in a small bag, the object of the stick being to act as a handle. The claim in the action is not to prevent the defendants from calling their article "a bag with a stick in it," for it is not pretended that they do, but from making and selling bags with a stick in them, on the ground that such bags and sticks are the get-up of the plaintiffs' goods, and from supplying bags with a stick in them to any person who asks for them under that name. The claim is in my opinion founded on a misconception of the meaning of "get-up": that word implies something extraneous to the article, not the article itself—a handle is part of a basket, not of the get-up of a basket, just as Malvolio's legs were part of the man and the yellow stockings and cross garters were the get-up. It is unnecessary to ascertain whether any fantastic shape of handle, serving no useful purpose, could be part of the get-up; the

(1) 17 Rep. Pat. Cas. 490.

handle in this case has nothing fantastic or distinctive about it. This Court interferes to protect honest traders in fair trading; it does not assist any trader to acquire by trading an exclusive right to things in common use or of common utility. It is for the trader to apply something distinctive to his goods; he cannot monopolize shape by making his goods in a round or oval form: or size, by making them large or small—or any simple colour, such as red or white or blue as distinct from a peculiar combination thereof: nor any useful part of the article itself: see *Williams* v. *Bronnley*. (1) He can, of course, adopt some useless addition as his device and may acquire a right to it, such as the little flag on an omnibus which Chitty J. supported in an unreported case; but the omnibus proprietor could never acquire a sole right to have a ladder leading on to his roof, or a dome over the conductor's head. The same observations apply to the claim to the words "with a stick in it." There is great force in Lord Shand's remarks in *Cellular Clothing Co.* v. *Maxton & Murray* (2), where he says: "If a person employing a word or term of well-known signification and in ordinary use—though he is not able to obtain a patent for his manufacture, and although he has not got the protection of a registered trade mark for the goods he is proposing to sell—is yet able to acquire the right to appropriate a word or term in ordinary use in the English language to describe his goods, and to shut others out from the use of this descriptive term, he would really acquire a right much more valuable than either a patent or a trade mark; for he and his successors in business would gain the exclusive right, not for a limited time as in the case of a patent, but for all time coming, to use the word as applicable to goods which others may be desirous of manufacturing and are entitled to manufacture and sell as much as he is. That being so, it appears to me that the utmost difficulty should be put in the way of any one who seeks to adopt and use exclusively as his own a merely descriptive term." It is, in my opinion, impossible for any man to obtain the right to prevent any trader who makes a bag with a stick in it from describing and supplying it as such.

(1) 26 Rep. Pat. Cas. 765. (2) [1899] A. C. 339, 340.

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Then it was argued that the defendant was guilty of fraud, and *Reddaway* v. *Banham* (1) was relied on. That case laid down no new law. Lord Macnaghten (2) cites James L.J.'s statement of the law and adopts it. But the facts of the case were unique. The plaintiffs' trade mark had for years been a camel: they called their manufacture camel hair (not camel's hair) belting; no one had any idea before action that such belting was really made of camel's hair. It was called "camel" hair because of the trade mark, not because of the material. It came out in the course of the trial that the belting was in fact made of camel's hair, that the defendant was unaware of its true composition, but was aware that every one knew that camel hair belting had for at least fourteen years meant, and meant only, the plaintiffs' manufacture, and he knew that the particular customer from whom he desired an order knew it and would not give an order unless the article was described so as to induce him to believe that it was of the plaintiffs' manufacture. Under such circumstances it was idle for the defendant to say that because he had by accident unwittingly and unintentionally deviated into the truth he was entitled to rely on his belated discovery of the facts to protect himself from the consequences of his intended untruth. It was a case of direct fraud, as pointed out by Lord Halsbury in *Cellular Clothing Co.* v. *Maxton & Murray.* (3) The result of *Reddaway* v. *Banham* (1) read in conjunction with *Cellular Clothing Co.* v. *Maxton & Murray* (4) is this: it is almost, but not absolutely, impossible for a trader to succeed in restraining his rival from describing the goods made by them both by the name of the materials of which they are in fact composed, such as "broadcloth," "all wool," or the like; but there may be circumstances so exceptional as to justify the conviction of the particular defendant of fraud in so doing, and in such a case he would, of course, be restrained.

But this has no application to the manufacture of the article itself. A trader may by user become entitled to prevent others from getting up such articles in such a dress or calling them by such a name as to lead to the belief that they are the plaintiff's,

(1) [1896] A. C. 199.
(2) Ibid. 215.
(3) [1899] A. C. 335.
(4) [1899] A. C. 326.

but he cannot prevent others from manufacturing the articles themselves. No man can acquire a monopoly of manufacture except under a patent: if he makes an article and relies solely on its necessary or useful component parts to distinguish his make from that of others he is not entitled to complain because others who make the same article adopt the same shape and form, although they may thereby lead people to believe that their articles are those of the plaintiff's manufacture: he has deliberately run the risk of such deception in order to try to obtain a monopoly to which he can never be entitled. Such an attempt is not fair trading from the point of view of his rivals or of the public: it puts his rivals in the disagreeable dilemma of having to run the risk of misleading or of giving up the whole of the trade in a particular article, and it is a fraud on the public as an attempt to establish a monopoly, not for fourteen years as given by a patent, but for all time, and not in consideration of any merit, but simply by lapse of time. Suppose a large combine, such as was attempted in tobacco a short time ago, succeeded in absorbing or crushing all rival manufacturers, and remained the sole makers of umbrellas for ten years: at the end of that time it would be proved that no one made umbrellas except the combine, and that when a purchaser asked for an umbrella he expected to get a stick with a frame covered with silk or alpaca made by the combine: could it be said that no one else could make a stick with a frame so covered or call it an umbrella?

In my opinion there is no suspicion of fraud in the present case: the registration as a design of the drawing in the patent was wrong and foolish, but cannot be called fraud, and it was entirely collateral to any question raised in this action. The defendants' honesty is shewn by the fact that they put their own name in large letters on the bags. The plaintiffs are, of course, entitled to go to trial if they please; but I view their conduct with great disapprobation. They set up a dishonest claim and have attempted to crush the defendants by filing nearly 200 affidavits in support of a motion that ought never to have been made, and I cordially agree with the order proposed by the Master of the Rolls giving the appellants the costs of the appeal and making the costs of the motion in the Court below the

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appellants' costs in any event. The appellants are entitled to an inquiry as to damages if they desire it. The injunction must, of course, be discharged.

KENNEDY L.J. I have had an opportunity of reading and considering the judgments prepared by Cozens-Hardy M.R. and Farwell L.J. I entirely concur with them in the conclusion at which they have arrived; and they have so fully stated the reasons, in which also I concur, upon which that conclusion is based, that I find nothing which I can usefully add in agreeing that this appeal should be allowed.

Solicitors: *Haslam & Sanders, for Hindle, Son & Cooper, Darwen; Ernest Salaman & Co.*

W. C. D.

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[1909 C. 3410.]

Power of Appointment—Fraud on Power—Appointment void or voidable—Bona fide Purchaser for Value without Notice—Reversionary Interest—Deed of Compromise—Effect of carrying Fund to Separate Account—Action to set aside Appointment—Priority.

An appointment under a common law power, or a power operating under the Statute of Uses, by which the legal estate has passed, is at most voidable, and a purchaser for value with the legal estate and without notice is not affected by the fraudulent execution of the power; but an appointment in fraud of an equitable power, not operating so as to pass the legal estate or interest, is void, and a purchaser for value without notice can only rely on such equitable defences as are open to purchasers without the legal title who are subsequent in time against prior equitable titles.

It is not in accordance with principle or authority to construe deeds of compromise of ascertained specific questions so as to deprive any party thereto of any right not then in dispute and not then in contemplation by any of the parties to the deed:—

Held, therefore, that persons claiming in default of appointment were not precluded from bringing an action to set aside a fraudulent appointment by the execution of a deed of compromise of this nature.

The carrying over in an administration action of a fund to the separate

account of the purchaser, subject to a life interest, is not equivalent to transfer or payment so as to give the purchaser a legal title.

The separate account is merely the machinery by which the Court has carried its declaration into effect, and so long as the fund remains in Court, that machinery is under the control of the Court.

Decision of Neville J. affirmed.

By a settlement dated January 2, 1877, made on the marriage of A. G. Harvie and Emma Frances, his wife, certain reversionary interests belonging to the wife, one of which was "one fifth part of such sum as should at the death of the survivor of her father and mother according to the market value for the time being be equal to 25,000*l.*," a policy of assurance upon the husband's life, and 1000*l.* which he covenanted should be paid by his executors after his death, were assigned to trustees upon trust for investment and to pay the income to the wife for life, remainder to the husband if living, and subject thereto upon trust for all or such one or more exclusively of the others or other of the issue of such marriage to be born during the lives of the said A. G. Harvie and his said wife or within twenty-one years afterwards in such shares and manner as they should jointly by deed, or the survivor should by deed or will, appoint, and in default of appointment for the children of the marriage who should attain twenty-one or if females marry under that age.

There were seven children of the marriage, the first of whom died in early infancy; the second, Arthur Leonard Harvie, attained the age of twenty-one on October 2, 1899. On October 14, 1899, Mr. and Mrs. Harvie executed a deed poll appointing 4000*l.*, part of the settled trust funds, to A. L. Harvie. On December 6, 1899, he mortgaged his interest under the appointment for 1000*l.* to an insurance society. This mortgage had been transferred to the defendants H. W. C. Storey and C. Storey. On June 27, 1901, A. G. Harvie and his wife appointed the residue of the said one fifth of 25,000*l.* Consols, after payment thereout of the 4000*l.* already appointed, to A. L. Harvie. On August 8, 1901, he sold and assigned all his interest under the second appointment to the Reversionary Company of Great Britain, by whom it had been assigned to the defendants the Property and Estates Company. At the dates of these

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appointments the settled interest was still reversionary, Mrs. Harvie's mother being dead, but her father survived until March 14, 1908.

During the negotiations for the mortgage and sale of the appointed interests A. L. Harvie had made two statutory declarations that there was not either directly or indirectly any bargain of any sort with his father or mother as a condition precedent to the appointments in his favour, and the money advanced would be received by him for his own unstinted use and benefit.

On each occasion he paid the money received over to his father, and the judge held on the evidence that this was done in accordance with a previous bargain.

In 1904 an action (*Woodbridge* v. *Harvie*) was commenced by a mortgagee of Mrs. Harvie's life interest under the settlement claiming relief against the trustees for a breach of trust and to have the trust executed under the direction of the Court. The plaintiffs and the other children of the marriage were made parties.

On October 15, 1908, an agreement for a compromise of the action of *Woodbridge* v. *Harvie* was entered into and signed by the plaintiffs in this action. This agreement provided that out of the capital of the funds subject to the trusts of the said marriage settlement a sum equal to one fifth of 25,000*l*. Consols according to the market value on March 14, 1908 (the date of the death of Mrs. Harvie's father), should be carried to a separate account entitled "Shares of the Property and Estates Company, Limited, and its incumbrancers subject to the life interest of Emma Frances Harvie and her mortgagee."

By an order made in *Woodbridge* v. *Harvie* on November 16, 1908, the compromise was approved on behalf of an infant and ordered to be carried out, and under this order a sum of 4219*l*. 10*s*. had been paid into Court to the separate account aforesaid and invested in 5002*l*. 0*s*. 10*d*. Consols which at the time this action was brought were still standing to the separate account above mentioned. The validity of the appointments was not called in question in the action of *Woodbridge* v. *Harvie*.

On November 27, 1909, two of the daughters of the marriage

commenced this action (*Cloutte* v. *Storey*) against the Property and Estates Company, their mortgagees, H. W. C. and C. Storey, and the trustees of the settlement, asking for a declaration that the appointments were frauds on the power, and that the defendants H. W. C. and C. Storey and the company claiming thereunder had no interest in the trust premises, and for an order that the deeds of appointment should be cancelled.

The Court held on the evidence that the appointments were frauds on the power, but that the defendants' predecessors in title had no notice of the frauds, and that at the date of the compromise of the action of *Woodbridge* v. *Harvie* the plaintiffs in this action had no notice of the invalidity of the appointments.

The action came on for hearing before Neville J. on June 17, 1910.

Felix Cassel, K.C., and *Ward Coldridge*, for the plaintiffs. On the evidence the two appointments are frauds on the power.

[NEVILLE J. It seems to me impossible on the evidence to support these appointments, which were undoubtedly made in the interest and for the benefit of the father and mother and were therefore frauds on the power.]

In the next place, appointments in fraud of a power are not merely voidable but wholly void: Sugden on Powers, 8th ed. pp. 611, 613; *Daubeny* v. *Cockburn* (1); *Aleyn* v. *Belchier* (2); White and Tudor's Leading Cases, 7th ed., vol. ii. pp. 308, 318; *Topham* v. *Duke of Portland.* (3)

The defence of purchaser for value without notice is not available unless the purchaser has got the legal estate. In Farwell on Powers, 2nd ed. p. 431, prop. 11, the law is stated merely that a purchaser for value without notice who has the legal estate is protected. In Sugden on Powers, 8th ed. p. 616, par. 28, it is expressly stated that a purchaser who has no notice, if he has not the legal estate, cannot protect himself in equity: *Birley* v. *Birley.* (4)

If a fraudulent appointment be made on the marriage of the

(1) (1816) 1 Mer. 626, 628.
(2) (1758) 1 Eden, 132.
(3) (1863) 1 D. J. & S. 517, 574.
(4) (1858) 25 Beav. 299.

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appointee, the children of the marriage cannot claim as purchasers for value: *Conolly* v. *M'Dermott* (1); *In re Nash.* (2) The appointor who has made an appointment in fraud of a power may disregard it and appoint again, and the second appointment is good if it be proved that the fraud did not continue: *Carver* v. *Richards.* (3)

The agreement for a compromise was entered into by the plaintiffs without any knowledge of the fact that the appointments were void, and is therefore no bar to the action. It is suggested that the carrying over the fund to a separate account is in some way a bar to the action. But the carrying to a separate account only shews that the persons to whose names it is carried are entitled to it free from the general questions in the action. There was no question in the action as to these appointments, and the carrying over has no effect on questions outside the action: *In re Eyton* (4); *Edgar* v. *Plomley.* (5)

Bramwell Davis, K.C., and *Rolt*, for the defendants. On the evidence there was no corrupt bargain on the part of the son, and that is essential to a fraud on the power. An appointment which is a fraud on the power is voidable only and not void. It may be confirmed by the persons entitled in default and so cannot be absolutely void: *Preston* v. *Preston.* (6) As to the defence of purchase for value without notice, the third proposition in *Phillips* v. *Phillips* (7) states that the plea is good against a mere equity as distinguished from an equitable estate. This distinction is recognized and applied in *Cave* v. *Cave* (8), *Bowen* v. *Evans* (9), and *Warde* v. *Dixon.* (10) Here the plaintiffs have a mere equity to set aside the appointment.

But, if we are wrong as to the case of a person who has no legal estate at all, in this case the plaintiffs have by virtue of the carrying over to a separate account what is equivalent to a legal estate. On the death of A. G. Harvie the fund was with the consent of all parties paid into Court and carried to this separate account instead of being paid to the trustees of the settlement

(1) (1825) Sugden's Law of Real Property, p. 513.
(2) (1856) 5 Ir. Ch. Rep. 384.
(3) (1860) 1 D. F. & J. 548.
(4) (1890) 45 Ch. D. 458.
(5) [1900] A. C. 431.
(6) (1869) 21 L. T. 346.
(7) (1862) 4 D. F. & J. 208.
(8) (1880) 15 Ch. D. 639, 646.
(9) (1844) 1 Jo. & Lat. 178, 263.
(10) (1858) 28 L. J. (Ch.) 315.

or paid into the general credit of the action. That amounted to a decision that the fund was free from all the trusts of the original settlement and held by the Court in trust for the persons named in the account only: *Thorndike* v. *Hunt* (1); *In re Jervoise.* (2) The beneficiaries take it subject to any equities of which they have notice, but free from all others. *Taylor* v. *Blakelock* (3) shews that there may be a legal estate in stock though the stock is in the name of a trustee, and *Taylor* v. *London and County Banking Co.* (4) is to the same effect.

C. Lyttelton Chubb, for the trustees.

NEVILLE J. There are several points which have to be decided in the present case, and the first is whether the appointments in question were valid appointments or in fraud of the power. I have seen the correspondence which took place between the father and the eldest son to whom the appointment was made at and after the time of the appointment, and I have come to the conclusion that the appointment was made by the father for his own benefit, and on the understanding with the son that the father was to reap the benefit and not the son, and I think that it was a fraud upon the power.

The next question is whether the societies who dealt with the son as appointee had notice of the fraud upon the power, or that the appointment was not a valid exercise of the power. Of course it was a case of suspicion. It was an appointment of a large proportion of what was in the father's power to appoint amongst his family to the eldest son immediately after his attaining twenty-one, but in face of the statutory declarations made by the son which were properly required by the societies I think it impossible to hold that they were affected by notice of an irregularity in the execution of the power. That, therefore, brings me to the point argued by Mr. Bramwell Davis, whether a plea of purchase for value without notice is an answer to a claim by the persons interested in default of appointment, or whether such a plea is only valid where the defendant is the owner of the legal estate or the legal owner of the property.

(1) (1859) 3 De G. & J. 563.
(2) (1849) 12 Beav. 209.
(3) (1886) 32 Ch. D. 560.
(4) [1901] 2 Ch. 231.

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The proposition in Lord Justice Farwell's book (p. 429, proposition 11) is: "A purchaser for valuable consideration from the appointee who has acquired the legal estate without notice is not affected by the fraudulent execution of the power." In my opinion that, if I may say so with respect, correctly states the law on the matter, and I do not think that it is sufficient to prove that value was given by the assignee to the appointee, but that he must in some sense be clothed with the legal estate, in order to be able to raise a valid plea against the claim of the persons who have been defrauded by the execution of the power in the manner in question.

Now some difficulty is raised by the third proposition in *Phillips* v. *Phillips* (1), the effect of which is that as between the owner of an equity as distinguished from the owner of an equitable estate (which I think must be equivalent to an equitable interest—I think Fry J. put it in that way in *Cave* v. *Cave* (2)) a plea of purchase for value is adequate to give priority to the owner of the equitable interest as against the person entitled merely to an equity.

The first consideration in that connection is whether such an appointment as this is void or only voidable, because, if it be void, any difficulty with regard to the decision in *Phillips* v. *Phillips* (1) disappears, inasmuch as the assignee from the appointee would get no equitable interest or estate at all, and consequently the point would not arise. But if it be only voidable different considerations arise. Now I think there is no doubt that an appointment to a person not the object of the power is void, and I think the preponderance of authority, on reference to the expressions that have been used, is in favour of the further proposition that the execution of a power in fraud of that power is also void. But there is the case of *Preston* v. *Preston* (3), in which Lord Romilly distinctly expressed his opinion that such an appointment was voidable only and not void. It was in a case in which a deed was set up to which the appointor, the person then entitled to appointment over the fund, was a party, and all the persons who were interested in

(1) 4 D. F. & J. 208. (2) 15 Ch. D. 639.
(3) 21 L. T. 346.

default of appointment, and it was held that the persons claiming under that deed were entitled to hold the fund that had been appointed. Now it seems to me that what Lord Romilly says is in fact only a dictum and not necessary to the decision in the case, because I think it is quite clear that, supposing a man made an appointment in fraud of a power to the objects of the power, and then a deed was executed by the appointor and all the persons who would take in default of appointment, and they purported to confirm the invalid appointment so as to vest in the appointee all the fund which was subject to the power of appointment, the intention of that deed would be quite clear, and effect could be given to it in equity. I think a Court of Equity would hold such a deed to mean that it was an assignment of their interest by the persons entitled in default of appointment and a release of his power by the appointor, because, as we know, the appointor is not a trustee of the power and can release it if he pleases. In the deed in *Preston* v. *Preston* (1) the appointor had actually released the power, and I think the intention of the parties under that deed was sufficiently plain, and the conclusion must have been precisely the same whether such appointment is void or only voidable.

I come, therefore, to the conclusion that such an appointment as this is void and not merely voidable, and consequently that no difficulty arises with regard to the case of *Phillips* v. *Phillips*. (2)

The next point to be considered is what was the result of the compromise that was entered into in the action in the Chancery Division. That was an action by the mortgagee of the life interest of the tenant for life, and as a beneficiary under the settlement the plaintiff sought to recover from the trustees in respect of alleged breaches of trust. Ultimately all the persons interested under the settlement were added as parties, and a decree was taken in pursuance of a deed of compromise which was executed by, amongst other persons, both the plaintiffs in the present action, and the decree proceeded upon the footing of the validity of the appointments in question. It is said that that was a compromise which bound the interests of the plaintiffs

(1) 21 L. T. 346. (2) 4 D. F. & J. 208.

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and prevented them from afterwards raising the question of the invalidity of the appointments. Now in my opinion that is not so: there was no question raised in that action with regard to the validity of the appointments, nor do I think that any such question could have been raised, and the plaintiffs had at that time no knowledge of the facts upon which the invalidity of the appointment depends. I think, therefore, it would be wrong to conclude that the plaintiffs were barred from the assertion of their rights in this regard when that knowledge came to them.

But that does not completely dispose of the case, because there is yet a further point, and a point not without difficulty—that is, what was the effect of the carrying over in that action of the fund in question to a separate account entitled "Shares of the defendant company and its incumbrancers subject to the life interest of Mrs. Harvie and her mortgagee"? It is said that that is equivalent to clothing the defendants with the legal estate or interest in the fund in question, and consequently that the conditions of the proposition in Farwell L.J.'s book have been satisfied, and that the defendants have shewn that they were purchasers for valuable consideration who have acquired the legal estate. Now in the case of *In re Eyton* (1), before Chitty J., and in the case before the Privy Council, *Edgar* v. *Plomley* (2), a good deal of light is thrown upon the effect of carrying over to a separate account; but I do not think that either of those cases affects the question that I have to deal with here, because this is not the case of somebody who upon the faith of the order carrying over the fund has dealt with the person on the face of the order entitled to it, but it is a question of an interest adverse to that of the person to whose separate account the funds were carried and they were so carried subject to a life interest. Now it is quite clear that you may have a legal interest (a legal estate, if you like to call it so) in stock, and if authority to that effect was needed the cases cited by Mr. Rolt are amply sufficient. But that is not, I think, the same question as whether you can have a legal estate in a reversionary interest in stock, and I confess I do not see how such a legal estate can exist, and I think that so long as the fund remains a reversionary

(1) 45 Ch. D. 458. (2) [1900] A. C. 431.

fund the right of the person defrauded by the execution of the power remains, and that right can be asserted against the assignee of the appointee.

I think, therefore, that in this case the plaintiffs are entitled to succeed and are entitled to the declaration which they ask for. I cannot give any further relief: that must be applied for in the action to the credit of which the funds are standing.

After some discussion the deeds of appointment and the correspondence were ordered to be brought into Court.

J. R. B.

C. A.

The defendants appealed. The appeal was heard on October 27 and 31, 1910.

Cave, *K.C.*, and *Rolt*, for the defendants. The defendants are purchasers for value without notice. An appointment which is a fraud upon the power, unlike an appointment to a person who is not an object of the power, is not void ab initio, but is voidable only, and is capable of being affirmed by the persons entitled in default of appointment: *M'Queen* v. *Farquhar* (1); *Preston* v. *Preston* (2); *Askham* v. *Barker* (3); *Skelton* v. *Flanagan* (4); Farwell on Powers, 2nd ed. p. 429.

[FARWELL L.J. referred to the form of order in *Topham* v. *Duke of Portland* (5), set out in Seton on Judgments, 6th ed. p. 1742.

Upjohn, *K.C.*, for the plaintiffs, referred to *Carver* v. *Richards*. (6)]

The defendants' title to the fund in dispute was recognized by the compromise of October 15, 1908. Under that compromise the fund was transferred to a separate account earmarked by the defendants' name, and that is the same thing as if the money were in the defendants' hands. In the case of personalty what has happened here is the equivalent of getting in the legal estate in land: *Thorndike* v. *Hunt* (7); *Taylor* v. *Blakelock* (8); *Taylor* v. *London and County Banking Co.* (9) The effect of

(1) (1805) 11 Ves. 467.
(2) 21 L. T. 346.
(3) (1850) 12 Beav. 499.
(4) (1867) Ir. R. 1 Eq. 362.
(5) (1869) L. R. 5 Ch. 40.
(6) 1 D. F. & J. 548.
(7) 3 De G. & J. 563.
(8) 32 Ch. D. 560.
(9) [1901] 2 Ch. 231.

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transferring a fund to a separate account in an action is that the persons specified in its heading are the owners of the fund so far as is consistent with its retention in Court: *In re Jervoise* (1); *In re Eyton* (2); *Edgar* v. *Plomley*. (3) Inasmuch as the appointments which the plaintiffs seek to have set aside deal with the equitable interest only, the defendants, being assignees of a mere equity, might have a difficulty, having regard to *Daubeny* v. *Cockburn* (4), in supporting their assignment, apart from the compromise and the payment into Court to a separate account; but that transaction has the effect of passing to the defendants the benefit of the legal title to the funds, for a purchaser for value without notice is entitled to the benefit of a legal title not merely where he has actually got it, but where he has a better right to call for it: *Taylor* v. *London and County Banking Co.* (5)

Upjohn, K.C., Felix Cassel, K.C., and *Ward Coldridge*, for the plaintiffs. First, the appointments passed nothing and were void. Secondly, the compromise does not affect the question, for it was not the intention of the compromise to settle any dispute about the validity of the appointments or to confer on those who claimed under the appointments any new rights. Thirdly, if the appellants acquired no right under the appointments and no right under the compromise, the mere payment of the fund into Court to a separate account conferred no right upon them. No authority which has been cited touches this case. The carrying to the special account was not judicially considered by the Court. One of the parties was an infant and the compromise required to be sanctioned on his behalf, but the Court was not informed that there was any question as to the validity of the appointments. Nothing irrevocable has been done. The legal estate passed to the Paymaster-General, but he holds it in trust for the persons rightly entitled: *Gillespie* v. *Alexander*. (6) That case disposes of the appellants' argument as to the effect of the carrying to a separate account.

An appointment which purports to be under a power, but in

(1) 12 Beav. 209.
(2) 45 Ch. D. 458.
(3) [1900] A. C. 431.
(4) 1 Mer. 626.
(5) [1901] 2 Ch. 231, 262, 263.
(6) (1827) 3 Russ. 130.

fact is a fraud on the power, is absolutely void, not voidable, and cannot be confirmed: *Daubeny* v. *Cockburn* (1); *Carver* v. *Richards.* (2) *M'Queen* v. *Farquhar* (3) is distinguishable, as is also *Preston* v. *Preston.* (4)

The compromise of certain ascertained and specific questions does not deprive any party thereto from questioning the validity of the execution of this power, a point not then in dispute: *Bennett* v. *Merriman* (5); *Lawton* v. *Campion.* (6)

The carrying over of this fund to the separate account of the purchasers is not equivalent to a transfer or payment. The effect of such a carrying over is considered in *In re Jervoise.* (7) The decisions in *In re Eyton* (8) and *Edgar* v. *Plomley* (9) are distinguishable because in both those cases the advance was made after the fund had been carried over. Till the fund is parted with the Court has control: *Noble* v. *Stow.* (10)

Cave, K.C., in reply.

C. Lyttelton Chubb, for the trustees.

Cur. adv. vult.

Nov. 17. COZENS-HARDY M.R. Both Fletcher Moulton L.J. and I have had an opportunity of reading the judgment prepared by Farwell L.J., with which we entirely agree.

FARWELL L.J. This appeal raises three distinct points, and I propose to deal with them separately:—

1. Under their marriage settlement, dated January 2, 1877, A. G. Harvie and his wife, after successive life interests to themselves, had a joint power of appointment over personal property vested in the trustees of the settlement in favour of the issue of their marriage. They had seven children, of whom the eldest attained twenty-one on October 2, 1899.

On October 14, 1899, Mr. and Mrs. Harvie by deed appointed to him out of the trust funds 4000*l.*, subject to their own life interest therein, and on December 6, 1899, the son mortgaged

(1) 1 Mer. 626, 637.
(2) 1 D. F. & J. 548.
(3) 11 Ves. 467.
(4) 21 L. T. 346.
(5) (1843) 6 Beav. 360.
(6) (1854) 18 Beav. 87.
(7) 12 Beav. 209.
(8) 45 Ch. D. 458.
(9) [1900] A. C. 431.
(10) (1859) 29 Beav. 409.

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this appointed sum to secure 1000*l.* On June 27, 1901, the parents appointed to the same son the residue of the wife's reversionary interest subject to the 4000*l.*, and on August 8, 1901, the son sold both the appointed sums to the Reversionary Interest Company of Great Britain, and on November 30, 1903, that company assigned their interest to the defendants in this action. Both the appointments were made on a secret arrangement with the parents for their benefit and were frauds on the power, but the purchasers had no notice thereof. The purchasers have not the legal title.

This action was brought last year by two of the children entitled in default of appointment and claims a declaration that the two appointments to the eldest son are void, and Neville J. has decided in their favour.

The purchasers appeal and contend that they are purchasers for value without notice, that the appointments are not void but voidable, and ought not to be set aside against them. Now the power in this case is equitable only; i.e., it has no direct operation on the legal interest and could not have been enforced or challenged in any common law Court; the trustees in whom the legal title is vested must have transferred the property in order to give legal effect to the appointments. In such a case the difference between void and voidable is of little, if any, importance. Equity administers the trusts of the settlement and has regard only to equitable interests and equities: the appointments operate only in equity and are mandates to the trustees as to the mode of dealing with the legal title: there is nothing to be set aside or delivered up to be destroyed before effect can be given to the rights of the parties, because the Court has all the materials in its own hands and deals with the parties according to their rights in equity only. It would be otherwise if the power enabled dealings directly affecting the legal estate—e.g., if (as in *M'Queen* v. *Farquhar* (1)) the settled property was real estate conveyed to the use of such of the children as the parents should by deed appoint: the common law would inquire only whether the appointee was a child and whether the deed was duly executed in accordance with the power, and if these

(1) 11 Ves. 467.

questions were answered in the affirmative would hold the execution valid.

Any questions of a fraud on the power would be for equity only: Sugden on Powers, 8th ed., pp. 602 and 606. In such a case the appointee would have the legal estate, and it would be necessary to set aside the appointment in order to get rid of the legal estate which had passed thereunder; and in an action for that purpose the plea of purchase for value without notice passing the legal estate would be a good defence: *M'Queen* v. *Farquhar.* (1) But in equity the appointment is void, not voidable: see *Duke of Portland* v. *Topham* (2), where the order of the Court of Appeal was affirmed by the House of Lords, and in the second case of *Topham* v. *Duke of Portland* (3); although by reason of the immateriality of the distinction in equitable transactions "voidable" is sometimes used when "void" would be more accurate. The difference is apparent on comparing the order of the Court of Appeal in *Topham* v. *Duke of Portland* (3) (Seton, p. 1742) declaring simply that the fraudulent appointment is void with that in cases of deeds procured by fraud at p. 2312, directing the deeds to be set aside and delivered up to be cancelled. If an appointment is void at law, no title at law can be founded on it; but this is not so in equity: the mere fact that the appointment is void does not prevent a Court of Equity from having regard to it: e.g., an appointment under a limited power to a stranger is void, but equity may cause effect to be given to it by means of the doctrine of election. The law may be stated thus: an appointment under a common law power, or a power operating under the Statute of Uses by which the legal estate has passed, is voidable only, and a purchaser for value with the legal estate and without notice is not affected by the fraudulent execution of the power; but an appointment in fraud of an equitable power, i.e., not operating so as to pass the legal estate or interest, is void, and a purchaser for value without notice but without the legal title can only rely on such equitable defences as are open to purchasers without the legal title who are subsequent in time against prior equitable titles. In the present case the children

(1) 11 Ves. 467.

(2) (1864) 11 H. L. C. 32, 44, 45, 61.

(3) L. R. 5 Ch. 40.

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have vested equitable estates or interests in remainder expectant on their surviving parents' death; the appointment purports to interpose an equitable estate or interest in priority thereto; both are of the same nature, and the argument founded on *Phillips* v. *Phillips* (1) does not arise, nor is there anything in *Carver* v. *Richards* (2) opposed to this view: it is true that in that case the estates were limited to uses, but nothing turned on the legal estate: the question was whether the third appointment (which was unobjectionable, and was to the same appointees as the two first) was effectual in equity; it was immaterial whether the legal estate had passed by the former appointments or by the third, and the question was therefore not discussed.

It was then argued that the appointments in this case were voidable because they could be ratified or confirmed. But ratification or confirmation in such a case is used in the strict legal sense and is not accurately applied to appointments under equitable powers: the persons entitled in default of appointment in *M'Queen* v. *Farquhar* (3) could have ratified or confirmed the legal use created by the appointment, because the estate had already passed at law, and they would have ratified that estate. But when no estate has passed, "ratification" in the legal sense has no application: the legal estate has to be conveyed by the persons in whom it is vested, and the persons entitled in default of appointment establish the appointee's interest, not by ratifying or confirming his legal title, for he has none, but by conveying or directing the conveyance of the legal title vested in them or in trustees for them to him. I have gone fully into the matter as it was fully argued, but the point is in my opinion involved in Sir William Grant's decision in *Daubeny* v. *Cockburn* (4): "But this plaintiff contends for much more. He says that the payment of a valuable consideration sets up the appointment, quoad himself as a purchaser. I cannot, however, think that the payment of a consideration to Mrs. Cole could have any such effect. Setting aside the circumstance, that Sir William Cockburn has the legal estate, it is enough for the present purpose that it is not in the plaintiff, and was not in Mrs. Cole; that there are only equities to

(1) 4 D. F. & J. 208.
(2) 1 D. F. & J. 548, 561.
(3) 11 Ves. 467.
(4) 1 Mer. 638.

deal with. If the appointment be such, that a Court of Equity will hold it did not vest anything in Mrs. Cole, how could it devest anything out of Sir William Cockburn? The payment of a money consideration cannot make a stranger become the object of a power created in favour of children. He can only claim under a valid appointment executed in favour of some, or one, of the children. An appointment, at first impeachable as voluntary, may ex post facto be turned into an appointment for a valuable consideration;—but that is, where a valuable consideration was all that was wanting to have made it good ab initio." Then, after referring to *George* v. *Milbanke* (1), the Master of the Rolls says (2): "But, where there is fraud, the payment of money cannot make the appointment cease to be fraudulent, although it may make it cease to be voluntary."

2. The next point is this. On May 3, 1904, the husband died. In 1904 the mortgagee of the life interest of Mrs. Harvie in the trust funds brought an action against the trustees, the mortgagor, and some of the children for the administration of the trusts of the settlement and to make the trustees responsible for breaches of trust: in the course of the proceedings it became apparent that the trustees were not in a position to make good any breaches of trust proved against them, and a compromise was arranged by which a certain sum was to be accepted in discharge, and the trustees were to bring all the trust property into Court. In order to make this compromise effectual all the children had to be brought before the Court, and as one of them was an infant, the sanction of the Court on his behalf had to be obtained. Nothing was known to any of the parties of any fact throwing suspicion on the present defendants' title; the appointments under which they claimed were assumed to be and were treated as good, and a long agreement, that of October 15, 1908, was executed and approved by the Court on behalf of the infant accordingly. It was argued that this was an agreement between all parties to recognize the present defendants' title, and that they gave consideration for it: this contention is in my opinion untenable: the agreement was entered into for an entirely different purpose, and the recital shews that the questions "now in dispute" only

(1) (1803) 9 Ves. 190. (2) 1 Mer. 639.

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were the subject of settlement: the parties were bound to inform the Court of all material circumstances when asking for its sanction on behalf of the infant, but no one knew or suspected any possibility of dispute on the grounds put forward in the present action, and the Court was therefore necessarily not informed thereof. It is not in accordance with principle or authority to construe deeds of compromise of ascertained specific questions so as to deprive any party thereto of any right not then in dispute and not in contemplation by any of the parties to such deed: see *Bennett* v. *Merriman* (1); *Lawton* v. *Campion*. (2) It is said that the amount carried over to the separate account might have been more, but even if this were so, I see no consideration thereby passing from the present defendants that can be made available for their benefit in this present action: the amounts were settled for the convenience of all parties, and there is no ground whatever for saying that the present defendants accepted more or less in consideration of any acknowledgment of their title.

3. The third point is this. It is said that if the appointed fund had been paid over to the present defendants, either by transfer of the stocks and securities to them by the trustees, or by payment to them of the proceeds of the realization thereof by the trustees, they would have obtained the full legal title and possession, and restitution could not have been obtained from them; and in my opinion this, as a general proposition, is correct. But then it is said that the carrying over in this suit to the separate account already mentioned is equivalent to such transfer or payment; but this in my opinion is not correct.

The effect of carrying over to a separate account is thus stated by Lord Langdale in *In re Jervoise* (3): "When a fund is carried over to a particular separate account, it is released from the general questions in the cause, and becomes marked as being subject only to the questions arising upon the particular matter referred to in the heading of the account. The consequence is, that in all subsequent dealings with it, it becomes unnecessary to serve any of the parties to the cause except those interested

(1) 6 Beav. 360. (2) 18 Beav. 87.
(3) 12 Beav. 209.

in the particular fund; and the Court, from the heading of the account, sees at once the extent to which it has been severed from the other questions in the cause on the former hearing." In Lord Langdale's time the Master of the Rolls and the Vice-Chancellors had certain powers of rehearing, which were taken away by the Judicature Acts: *In re St. Nazaire Co.* (1) Under the present practice, if a judge of first instance has made a declaration of rights whether in the course of the administration proceedings or on further consideration, such declaration is binding on all parties properly brought before him unless or until it is successfully appealed against, and their right to any funds or money carried over to the separate account in accordance with such declaration cannot be impeached so long as the declaration remains standing: but apart from appeal, the same grounds (e.g., fraud or the discovery of facts that could not with reasonable diligence have been discovered before) that would suffice to have the declaration set aside would suffice also to have the title to the account altered: the separate account is merely the machinery by which the Court has carried its declaration into effect, and so long as the funds remain in Court that machinery is under the control of the Court. If, however, there is no declaration of title by the Court, and the money is carried over in the suit to administer the trust funds for convenience of administration only, then the Court can at any time before final distribution rectify and adjust such administrative orders in such a way as to ensure full and complete justice in the final distribution. *Gillespie* v. *Alexander* (2) and *In re Calgary and Medicine Hat Land Co.* (3) are illustrations of this principle.

Reliance was placed by the appellants on *Thorndike* v. *Hunt* (4), but in that case the funds were not carried over to a separate account in the suit for the administration thereof, but were paid over to a separate account in another and different suit to administer the trusts of another and different instrument. Such payment out of one suit into another is as much payment as if the parties named in the separate account in the second suit

(1) (1879) 12 Ch. D. 88.
(2) 3 Russ. 130.
(3) [1908] 2 Ch. 652.
(4) 3 De G. & J. 563.

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had themselves received payment out under an order to pay to them direct.

The cases of *In re Eyton* (1) and *Edgar* v. *Plomley* (2) have no application here, because in both those cases the mortgagee lent his money after the funds had been carried over to the separate account on the faith of the order directing it. I find nothing in the judgments in either of those cases conflicting with anything that I have said above: they are only illustrations of the way in which the Court has regard to all equities in dealing with funds in Court under its control; and I think the judgment of the Privy Council in *Edgar* v. *Plomley* (2) is in favour of my view. It is there stated (3) as follows: "But the object of separate accounts is to relieve the subjects of each account from entanglement with the others, and to make the persons specified in each heading the owners of the fund carried to its credit, so far as is consistent with the necessity for retaining those funds in Court. The retention of the fund is not meant to prevent adult owners of interests in it from dealing with those interests. The division into separate accounts is intended to facilitate such dealings. Of course it is true that, so long as any fund remains in Court, claims against its owners can practically be enforced against it which could not practically be enforced if it were paid out. It is open to the other parties to the suit to shew that they have claims enforceable against a separate fund which were not known or non-existent when the fund was separated, and by proper proceedings to enforce them notwithstanding the order for separating the fund. But until some step is taken for that purpose the separation is commonly and rightly looked upon as shewing that the separate funds are free from claims by the other sharers in the estate."

The result is that the appeal fails and should be dismissed with costs.

I observe that Neville J. in the present case, after declaring the appointments void, directs the deeds to be delivered up to be cancelled: this is not necessary and I think should be omitted, because it might embarrass the defendants in suing on the

(1) 45 Ch. D. 458. (2) [1900] A. C. 431.
(3) [1900] A. C. 441.

covenants in their purchase deeds to be unable to produce the deeds of appointment: no point, however, was made of this on the appeal, and the alteration should not affect the costs.

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Solicitors: *Fowler & Co.; Oldfields.*

W. C. D.

In re COHEN.

BROOKES *v.* COHEN.

[1910 C. 540.]

JOYCE J. 1910 *Oct.* 17, 18, 19.

Power of Appointment—Exercise—Special Power—Appointment to Object of Power—Condition to pay Appointor's Debts—Purpose foreign to Power—Fraud on Power—Invalidity.

The donee of a special power to appoint his share under his father's will to his wife and children, in exercise of the power, appointed an annuity of 1200*l.* to his wife, and in case his residuary estate should be insufficient to pay his just debts he directed that the trustees of his father's will should pay to his wife an additional annuity of 500*l.* so long as any of his debts should remain unpaid or for a period of ten years from his death, whichever should be the shorter period, on condition that, and so long as, she should expend the sum of 400*l.* in every year in the payment of his debts; and after the debts should have been fully paid by her or after the expiration of ten years from his death, whichever should be the shorter period, to pay to her, if she should have fulfilled the condition, instead of the said additional annuity of 500*l.*, an additional annuity of 100*l.* for the remainder of her life, and subject thereto he appointed the trust funds to his children:—

Held, that the condition could not fairly be separated from the appointment, and that the execution of the power was fraudulent and void as having been made for a purpose wholly foreign to the power. The appointment of the additional annuities was therefore bad.

ADJOURNED SUMMONS.

Under the will of his father, A. Cohen, S. B. Cohen was entitled for his life to three eleventh shares of certain property producing a yearly income of 11,000*l.*, and the will directed that after the death of S. B. Cohen the trustees should hold his share and the income thereof in trust for all his children as he should by will or deed appoint, and in default of appointment in trust for his children equally.

The will further provided that it should be lawful for the said

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S. B. Cohen to appoint by will that from and after his decease the whole or any part of the income of his said share should be paid to any wife who might survive him for her life or any less period, and the interest so appointed unto or for the benefit of such surviving wife should take effect in priority to the trusts thereinbefore declared concerning his share to take effect after his death.

A. Cohen died in 1901.

S. B. Cohen by his will, dated in 1908, in exercise of the power under his father's will, appointed and declared that the trustees of the will of A. Cohen should stand possessed of his share under the will upon trust to pay an annuity of 1200*l.* to his wife during widowhood, to be reduced to 600*l.* per annum in the event of her marrying again, and further to pay to her an additional annual sum of 100*l.* for the maintenance of each of his children until they attained the age of twenty-one or married under that age. And he further appointed, in case his residuary estate should be insufficient to pay his just debts, that the said trustees should pay to his wife an additional annual sum of 500*l.* so long as any of his debts should remain unpaid, or for a period of ten years from his death, whichever should be the shorter period, on condition that, and so long as, she should expend the sum of 400*l.* in every year in the payment of his debts; and after the debts should have been fully paid by her or after the expiration of ten years from his death, whichever should be the shorter period, to pay to her, if she should have fulfilled the condition, instead of the said additional annuity of 500*l.*, an additional annuity of 100*l.* for the remainder of her life, and, subject to the trusts thereinbefore declared, he appointed the trust funds to his children.

S. B. Cohen died insolvent in 1909, leaving his widow and three children, all of whom were infants, him surviving.

This was an originating summons taken out in the matter of the trusts of the will of A. Cohen by the widow (now Mrs. Brookes) for the determination (inter alia) of the following question:—

Whether the appointment contained in the will of S. B. Cohen that in case his residuary estate should be insufficient to pay his debts the trustees of the will of A. Cohen should out of the

income of the trust fund thereby directed to be held upon trust for S. B. Cohen for life and upon the other trusts therein mentioned pay certain annual sums to the plaintiff was or was not valid.

Younger, *K.C.*, and *Paice*, for the plaintiff. Although the condition may be bad the appointment remains good. It is immaterial whether the condition is for the benefit of the appointor. The fact of the condition being void does not necessarily indicate that the appointment is a fraud on the power: *Alexander* v. *Alexander* (1); *Hewitt* v. *Lord Dacre* (2); *Carver* v. *Bowles* (3); *McDonald* v. *McDonald* (4); *Sadler* v. *Pratt* (5); Farwell on Powers, 2nd ed. p. 298.

[They were stopped by the Court.]

Norton, *K.C.*, and *C. Stafford Crossman*, for the infant defendants. This is a clear case of a fraud on the power. There can be a fraud on the power without the existence of any bargain with the appointee: *Duke of Portland* v. *Topham* (6); *In re Marsden's Trust* (7); *D'Abbadie* v. *Bizoin* (8); *In re Perkins* (9); *Hay* v. *Watkins* (10); Farwell on Powers, 2nd ed. pp. 421, 422, 423, 433.

The appointor's object in making the appointment was to ensure the payment of his debts. That is a purpose which is entirely foreign to the wishes and intentions of the donor of the power, and the appointment on that condition was a clear fraud on the power. The condition cannot fairly be separated from the appointment and the whole is therefore bad.

Whinney, for the executor of S. B. Cohen.

R. H. Hodge, for the trustees of A. Cohen's will.

Younger, *K.C.*, in reply. Where there is a condition foreign to the power, and the Court has to determine whether the appointment is good or bad, if, upon construction of the instrument of appointment, there is an out and out gift to the appointee, and all that is done by the condition is that the fund is taken away

(1) (1755) 2 Ves. Sen. 640.
(2) (1838) 2 Keen, 622.
(3) (1831) 2 Russ. & My. 304.
(4) (1875) L. R. 2 H. L. Sc. 482.
(5) (1833) 5 Sim. 632.
(6) (1864) 11 H. L. C. 32.
(7) (1859) 4 Drew. 594.
(8) (1871) Ir. R. 5 Eq. 205.
(9) [1893] 1 Ch. 283.
(10) (1843) 3 D. & War. 339, 343.

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from the appointee in the event of his failing to do a certain thing, then the appointment will be upheld and the condition will be rejected, except in cases (1.) where there is a bargain between the appointor and the appointee, (2.) where the appointee is nothing but a pawn in a game, or (3.) where the appointment is made at the instance of a person outside the power: *Duke of Portland* v. *Topham* (1); *In re Marsden's Trust.* (2)

In *Hewitt* v. *Lord Dacre* (3) the condition was clearly a fraud on the power, nevertheless the appointment was upheld and the condition was rejected. If the condition can be severed, no matter how gross the fraud be, unless it be within one of the three before-mentioned exceptions, the condition will be struck out: *Carver* v. *Bowles.* (4)

JOYCE J. There is no doubt that where an appointment is made for the benefit of the appointor, that appointment may be a fraud upon or an abuse of the power, even although there may have been no bargain between the appointor and appointee, and no previous communication to the appointee of any intention that the appointee should apply the appointed fund in any way at variance with the terms or object of the power; and no doubt it is also true, as stated by Lord St. Leonards in the case of *Hay* v. *Watkins* (5), that "The cases go to this extent; that where the intention to benefit the object of the power is clear, and that something is superadded, a condition annexed to the gift not warranted by the power, there the gift is good; the Court will strike out what is excessive, and the appointee will take the fund absolutely." That proposition is also stated in Lord Justice Farwell's book on Powers at p. 298, there being this additional statement: "Where the boundaries between the excess and the execution are not distinguishable, the whole appointment fails"; and further, on p. 421, it appears that the cases also go to this, that "The execution is fraudulent and void if made for purposes foreign to the power, although such

(1) 11 H. L. C. 32.
(2) 4 Drew. 594.
(3) 2 Keen, 622.
(4) 2 Russ. & My. 304.
(5) 3 D. & War. 339, 343.

purposes are not communicated to the appointee previously to the appointment, and although the appointor derived no personal benefit."

In the present case, looking at all the circumstances, and weighing them carefully, and the terms in which the appointment purports to execute the power, and even although the condition annexed may not in terms be (and I think it is not in terms) a condition precedent, still upon the whole I think the sounder view here is that, as in many other cases, you cannot fairly separate the condition from the appointment. If the appointment in this case were accepted by the appointee, she certainly would be bound in honour to execute the condition, and I think it would be impossible that she should accept the 500*l.* a year under the appointment without carrying out the wishes of the testator, the appointor, as expressed in the appointment. Upon the whole I have not the slightest doubt that this appointment of the 500*l.* a year was made for the purpose, and solely for the purpose, of effecting an object which was not authorized by the power, and that this appointment would never have been made except for the expectation, and with the intention that the purpose should be fulfilled, namely, the payment of the appointor's debts.

Therefore I consider that this case comes within the proposition on p. 421 of Lord Justice Farwell's book, and that the execution was fraudulent and void—fraudulent only in the technical sense, of course—being made for a purpose, and solely for a purpose, foreign to the power. In my opinion the execution of the power was bad.

Solicitors: *S. B. Cohen & Dunn; J. Theodore Goddard; Linklater, Addison & Brown.*

G. A. S.

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[1910 V. 446.]

Land Transfer—Lease—Mortgage by Sub-demise—Subsequent Registration of Lessee as Proprietor—Sale by Mortgagee under Power of Sale—Requirement by Purchaser that Mortgagee should procure Registration of himself as Proprietor—"Registered Land"—"Charge"—Land Transfer Act, 1897 (60 & 61 *Vict. c.* 65), *s.* 16, *sub-s.* 2.

Where the owner of leaseholds in London, subject to a mortgage by sub-demise executed before registration of title under the Land Transfer Acts became compulsory, is registered under the Acts as the proprietor with a possessory title, and afterwards the mortgagee sells under his power of sale, the mortgagee is not the vendor of "registered land" within s. 16, sub-s. 2, of the Land Transfer Act, 1897, and the purchaser cannot require him to register his charge before completion or to procure a transfer from the registered proprietor.

Vendor and Purchaser Summons.

By an indenture of lease dated November 12, 1885, four leasehold houses known as Nos. 20, 22, 24, and 26, Dyssel Street, Dalston, in the county of London, were demised to George Preedy for the term of ninety-nine years from March 25, 1884, at a ground rent of 18*l.* per annum.

By a mortgage by sub-demise dated September 16, 1898, Joseph Rosenbaum, in whom the term had become vested, demised the premises to Henry Chetham for the unexpired residue of the said term (except the last day) by way of mortgage to secure 550*l.* and interest, and it was thereby declared that after any sale of the said premises or any part thereof under the statutory power of sale the mortgagor or other person in whom the premises should for the time being be vested for the last day of the said term should stand possessed thereof in trust for the purchaser, to be assigned and disposed of as he might direct, and the mortgagor thereby appointed the mortgagee his attorney to sign, seal, and deliver and perfect any deed, document, act, matter, or thing for the purpose of assigning or disposing of the said last day of the said term.

By an indenture of assignment dated May 11, 1900, in consideration of 250*l.*, Rosenbaum assigned the premises to

Isaac Abrahams for the unexpired residue of the said term subject to the mortgage of September 16, 1898.

On July 14, 1902, Abrahams was registered under the Land Transfer Acts at the Land Registry as proprietor of the premises with a possessory title.

By an indenture of transfer of mortgage dated July 23, 1902, to which Abrahams was a party, in consideration of 500*l.* paid to Chetham by Joseph Norris, Chetham at the request of Abrahams assigned to Norris the principal sum of 500*l.* owing on the said mortgage of September 16, 1898, and the interest to become due thereon and the benefit of all securities for the same sum and interest, and Chetham assigned and Abrahams demised and confirmed the leasehold premises comprised in the said mortgage to Norris for the unexpired residue of the term of ninety-nine years, except the last day thereof, discharged from all equity of redemption under the said mortgage, but subject to a new proviso for redemption. The transfer contained no declaration of trust of the last day.

Neither the original mortgagee under the mortgage of September 16, 1898, nor the transferee under the transfer of mortgage of July 23, 1902, was registered under the Land Transfer Acts.

On October 17, 1907, Norris died, having by his will appointed William Voss his executor, who duly proved the will.

On May 12, 1910, Voss put up the premises (with other property) for sale by auction in lots. In the particulars the premises (which were comprised in lot 2) were described as "held for a term of ninety-nine years from March 25, 1884, at a ground rent of 18*l.* per annum."

The conditions of sale stated (condition 3) that the title should commence with the lease of November 12, 1885.

Condition 7 (so far as material) was as follows:—

"The vendor is a mortgagee and will convey as such, and the concurrence of the owner of the equity of redemption shall not be required, and the vendor shall not be required to enter into any covenant other than the statutory covenant against incumbrances. No objection or requisition shall be made upon the ground that a day of the term under which any lot is held is

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outstanding in any mortgagor, nor shall the vendor be required to get in such outstanding day or trace the person in whom the same is or may now be vested."

At the auction Albert Saunders was declared the purchaser, to whom an abstract of title was sent in due course.

On May 25, 1910, the purchaser's solicitors delivered their requisitions on title, of which the following were material:—

16. "An authority to inspect the register of title No. 62,788 at the Land Registry must be given."

22. "In order to be in a position to execute a proper transfer of the property on the register to the purchaser the vendor must at his own expense get himself put on the register at the Land Registry as the registered proprietor of the property, in accordance with rule 151 of the Land Transfer Rules, 1903, 1907 and 1908 (consolidated)."

In answer to requisition 16 the vendor's solicitors stated "The vendor is not selling a registered title and can give no authority," and in answer to requisition 22 they stated "The vendor will not. He has not contracted to sell a title on the register."

The purchaser thereupon took out the present summons for a declaration that requisitions 16 and 22 had not been sufficiently answered, and that a title to the property had not been shewn in accordance with the contract.

J. E. Harman, for the purchaser. This case falls within s. 16, sub-s. 2, of the Land Transfer Act, 1897. (1) The vendor here is a vendor of "registered land" within the meaning of that sub-section: Brickdale and Sheldon's Land Transfer Acts, 2nd ed. p. 334. Under r. 175 of the Land Transfer Rules, 1903 (2), the vendor can easily procure himself to be registered

(1) The Land Transfer Act, 1897, s. 16, sub-s. 2, provides: "Where the vendor of registered land is not himself registered as proprietor of the land or of a charge giving a power of sale over the land, he shall, at the request of the purchaser and at his own expense, and notwithstanding any stipulation to the contrary, either procure the registration of himself as proprietor of the land or of the charge, as the case may be, or procure a transfer from the registered proprietor to the purchaser."

(2) Rule 175 of the Land Transfer Rules, 1903, provides: "Where it appears that any person is entitled to an incumbrance created prior

as proprietor of his incumbrance. Sect. 27 of the Land Transfer Act, 1875, enables the registered proprietor of a registered charge to sell the land on which he has a charge as if he were the registered proprietor of the land. Although registered land can be dealt with by unregistered deed, the legal estate does not in that case pass. Here, it is submitted, the vendor is vendor of "registered land" because in substance the land sold is in fact on the register.

The observations of Cozens-Hardy M.R. in *Capital and Counties Bank* v. *Rhodes* (1) are no doubt at first sight against me, but they must, it is submitted, be read with reference to the particular facts of that case. [He also referred to Key and Elphinstone's Precedents in Conveyancing, 9th ed. vol. i. p. 527, n., and Dart on Vendors and Purchasers, 7th ed. vol. ii. p. 1245.]

J. T. Prior, for the vendor. There is no substance in this application. The vendor is not the mortgagee of the particular interest which is on the register. Under the contract he has only agreed to sell the sub-term, and is therefore under no obligation to get in the outstanding day. He is not the vendor of "registered land." His estate is outside the register and cannot be put upon it. Mortgages by sub-demise are excepted from registration by Sched. I. to the Act of 1897, which amends s. 11 of the Act of 1875. Sect. 2 of the Act of 1875 provides that land shall not be registered unless it is of freehold tenure or is leasehold held under a lease which is either immediately or mediately derived out of land of freehold tenure. The vendor holds under a sub-demise which cannot be registered. "Registered land" throughout the Act means land in respect of which the title is registered, and this view is

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to the first registration of land, the registrar shall, on the application or with the consent of the person so entitled, and on due proof of his title, and after notice to the registered proprietor of the land, register such person as the proprietor of such incumbrance; but, where there are several such incumbrances, their relative priorities shall not be affected by the registration of some or one of them only, or by the order in which such of them as are registered are entered in the register."

(1) [1903] 1 Ch. 631, 655.

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supported by r. 151 of the Land Transfer Rules, 1903. (1) The vendor here does not come within s. 16, sub-s. 2, of the Act of 1897. [He also referred to ss. 18, 22, and 49 of the Act of 1875.]

J. E. Harman in reply. It is most important to the purchaser that he should know what is on the register. Apart, therefore, from s. 16 of the Act of 1897, it is an objection to title that the vendor cannot give the purchaser inspection of the register. The vendor is not entitled to say that the purchaser must complete without reference to what is on the register. [He also referred to rr. 2, 5, 6, and 7 of the Land Transfer Rules, 1903.]

WARRINGTON J. This case raises a question which is certainly one of some difficulty. It is a vendor and purchaser summons. The applicant is the purchaser, and he asks to have it declared that certain requisitions, being requisitions 16 and 22, made by him as to the title to the premises sold, have not been sufficiently answered, and that a title has not been shewn in accordance with the contract. [His Lordship read the requisitions, and continued:—] The vendor's answer to requisition 16 is this: "The vendor is not selling a registered title and can give no authority." That seems to be a sufficient answer so far as that requisition is concerned. It is not a complete answer to the purchaser's complaint, but it seems to me to be a complete answer to the requisition as things stand at present. As to requisition 22, the answer is this: "The vendor will not"—that is to say, he will not at his

(1) Rule 151 of the Land Transfer Rules, 1903, provides: "When the power of disposing of registered land has, by the operation of any statute or statutory power or by order of Court or by paramount title, become vested in some person other than the registered proprietor (as, for instance, in the case of a deed poll executed under section 77 of the Lands Clauses Consolidation Act, 1845, or of a declaration vesting an estate contained in or made under or by virtue of any statute, or of a sale by a mortgagee with a title paramount to the title registered) and the registered proprietor refuses to execute a transfer, or his execution of a transfer cannot be obtained, or can only be obtained after undue delay or expense, the registrar may, after due notice under these rules to such proprietor, and on production of the land certificate, and such evidence as he may deem sufficient, make such entry in or correction of the register as under the circumstances he shall deem fit."

own expense get himself put on the register. "He has not contracted to sell a title on the register."

Now the facts are these. By a lease dated November 12, 1885, the premises in question were demised to one Preedy for the term of ninety-nine years from March 25, 1884. That term became vested in one Rosenbaum. Rosenbaum by a deed dated September 16, 1898, demised the premises to one Chetham for the unexpired residue of the term of ninety-nine years, except the last day, by way of mortgage to secure a certain sum of money. The deed contained no express power of sale, but the mortgagee had, of course, the statutory power of sale under which in certain events he had power to sell and convey the property mortgaged for such estate and interest as was the subject of the mortgage. By the mortgage it was provided that after a sale under the statutory power the mortgagor would stand possessed of the last day of the term in trust for the purchaser. The point of that is that under the statutory power of sale given to the person who took the benefit of that deed that person could not dispose of the last day of the term, that is, he could not dispose of the whole term. He could only dispose of the sub-term created out of it. In May, 1900, Rosenbaum sold the premises to one Abrahams, and in 1902 Abrahams procured himself to be registered as proprietor in the leasehold register under the Land Transfer Act, 1897. The land certificate describes the premises and gives particulars of, the date of, and the parties to, the lease of November 12, 1885, and the amount of the rent, and then states: "14th July, 1902. Possessory title registered. First proprietor Isaac Abrahams." In the same month, a few days after the date of the land certificate, the mortgage of 1898 was transferred to one Norris, the transfer taking the form both of a transfer and of fresh covenants, and, as is usual in a case where the mortgagor is a party, it contained a fresh covenant by the mortgagor for payment and a fresh proviso for redemption. That deed contained no declaration of trust of the last day of the term, and the transferee was not put on the land register. Norris is now dead, and his executor is selling the property by virtue of the power of sale given to him as a person claiming under Chetham, the mortgagee under the deed of September 16,

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1898. The contract is to sell the premises described in the particulars and conditions of sale as "held for a term of ninety-nine years from 25th March, 1884, at a ground rent of 18*l.* per annum." The title is to begin with the lease of November 12, 1885. The only condition of sale to which it is necessary for me to refer is condition 7. [His Lordship read the material part of the condition, and continued:—]

The purchaser says that in the circumstances of this case it is the statutory duty of the vendors under sub-s. 2 of s. 16 of the Land Transfer Act, 1897, either to procure the registration of himself as proprietor of his charge—that is, the mortgage of 1898, which was prior in date to the land certificate—or to procure a transfer from the registered proprietor to the purchaser. That is really the meaning of requisition 22. Sub-s. 2 of s. 16 of the Act of 1897 provides: [His Lordship read the sub-section, and continued:—]

Now in a case like this what has the vendor to do? It is said that he has to procure the registration of himself as proprietor of the charge, and in order to see whether that is so or not one must ascertain what is meant by "charge" in the sub-section. It obviously means a charge giving a power of sale over the land. In the present case does the charge give a power of sale over the land comprised in the mortgage within the meaning of the sub-section? That leads on to the question what is the "registered land" under the sub-section, and for that one must look at the register and see in respect of what the proprietor is registered. The proprietor in the present case is registered as proprietor of the leasehold premises for the whole term of ninety-nine years, but the present vendor is not the proprietor of that term, nor is he the holder of a charge giving a power of sale over that term, but of a part only of that term. The sub-section, no doubt, gives rise to cases of great difficulty, because the vendor is, in one sense, proprietor of registered land. But his title is paramount to the registered title, and I cannot think that the sub-section was intended to make it incumbent on every vendor who has a paramount title to procure the registration of himself as proprietor. I think that what the sub-section means is that where land is on the register, and a person is registered

as proprietor of that land, then, if the vendor is the vendor of the land in respect of which the proprietor is registered, it might be his duty, at his own expense, to have himself put upon the register. But that is not this case. Here this vendor is not selling the term in respect of which Abrahams is registered as proprietor under the lease of 1885. He is only selling a portion of that term. The answer to the purchaser's claim is that the vendor is not the proprietor of registered land within the meaning of the sub-section. And I think that the language used in the sub-section shews that the vendor there referred to is either the proprietor of the land or of a charge giving a power of sale over the land. In the present case the vendor is neither the one nor the other. I do not think that under the sub-section he is the proprietor either of the land registered or of a charge giving him a power of sale over the land within the meaning of this sub-section.

I declare, therefore, that requisitions 16 and 22 have been sufficiently answered, and I dismiss the application with costs.

Solicitors: *Stanley Evans & Co.; R. Voss & Son.*

W. I. C.

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In re SHEPPARD.
DE BRIMONT *v.* HARVEY.

[1908 S. 88.]

Trustee—Breach of Trust—Authority to Solicitor to receive Trust Moneys—Permitting Retainer for unreasonable Time—Knowledge as to Solicitor's Unreliability—Trustee Act, 1893 (56 & 57 *Vict. c.* 53), *s.* 17, *sub-ss.* 1, 3.

In order to bring into operation s. 17, sub-s. 3, of the Trustee Act, 1893 (which provides that nothing in the section is to exempt a trustee from any liability which he would have incurred if the Act had not been passed, in case he permits money, received by a solicitor under a deed containing a receipt for the money, to remain in the latter's hands or under his control for a period longer than is reasonably necessary to enable him to pay the same to the trustee), the circumstances must be such that the trustee either knew or ought to have known of the receipt of the money.

X. and Y., who were trustees, were in July, 1902, told by B., their solicitor, that a mortgage forming part of the trust property would shortly be paid off and that the mortgage money would be placed to the joint account of the trustees at a bank, and they accordingly sent to B. a reconveyance of the mortgaged property (which contained in the body of it a receipt for the mortgage money) executed by them. B. then proceeded, on the mortgagors' behalf, to sell the property in lots, and he from time to time received the purchase-money for the lots, which money he ultimately misappropriated; but before any of the money had been received by B., X. died. Y. trusted in B.'s honesty and bona fide believed him to be a proper person to be entrusted with the mortgage money, and did not before December 4, 1902, know that B. had received any of the money. In the meantime Y. frequently inquired of B. whether he had received the money and was told by him that he had not received it. By December 4, 1902, it had become impossible to recover the money which B. had received.

The case was argued on the footing that the authority conferred by the reconveyance justified the receipt by B. by instalments and that the death of X. before any money was received by B. did not affect the question of Y.'s liability:—

Held (without deciding that the case had been argued on the proper footing but on the assumption that it had been so argued), that Y. was not liable to replace the misappropriated trust funds.

Quære, whether the death of X. revoked the authority conferred on the solicitor by the delivery to him of the reconveyance.

Quære, whether that delivery justified the receipt of the mortgage money by instalments.

The question under what circumstances a trustee ought to regard a solicitor as an unreliable person to receive trust moneys considered.

THIS was the trial of an action brought by beneficiaries under the will and codicils of Thomas Sheppard, who died in 1858, against the Reverend Francis Clyde Harvey, the surviving trustee of the will and codicils, for a declaration that the defendant as trustee had committed a breach of trust in permitting a firm of solicitors, Messrs. Booty & Bayliffe, (*a*) to obtain possession and control of a sum of 10,000*l.* forming part of the trust estate and (*b*) to retain possession of a deed of reconveyance and to retain in their hands the mortgage moneys alleged to have been received by them thereunder for a longer period than was reasonably necessary to enable them to pay the same to the then trustees of the will, and that the defendant was liable to make good to the estate of the testator a certain sum with interest at 4*l.* per cent.

In 1893 Colonel G. S. Harvey and the defendant, who were then the trustees of the will and codicils, sold certain Consols forming part of the estate and invested the proceeds, 10,000*l.*, on a mortgage to the trustees of a freehold building estate at South Norwood.

In July, 1902, W. H. M. Booty, of the firm of Booty & Bayliffe, obtained Colonel Harvey's execution to a deed of reconveyance of the mortgaged property (which deed contained in the body of it a receipt for the mortgage money) and then sent the reconveyance to the defendant for his execution. The defendant on July 31, 1902, executed the reconveyance and returned it to Booty, who had written to him to the effect that the matter would shortly be completed and that the 10,000*l.* when paid off would be placed to the joint account of the trustees at their bank.

Booty was apparently acting also for the mortgagors of the property, and, having obtained possession of the reconveyance, he proceeded, acting on behalf of the mortgagors, to sell the mortgaged property in lots, and from time to time received the purchase-moneys of the lots sold. According to the judgment of his Lordship he appeared to have paid what he received into his own banking account and ultimately to have misappropriated it.

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Colonel Harvey died on August 2, 1902, before Booty had received any of the money, but it was not set up by the counsel on either side that his death operated as a revocation of the authority, conferred by handing the executed reconveyance to Booty, to receive the mortgage money on behalf of the trustees, or that the authority thereby conferred did not justify the receipt of the mortgage money by instalments.

His Lordship found that the defendant completely trusted in Booty's honesty, and bona fide thought that he was a fit and proper person to be trusted with the money, and that certain facts with reference to Booty and certain Shuttleworth trusts, which were known to the defendant and are stated in his Lordship's judgment, were not such as ought to have led the defendant to a contrary belief.

The defendant did not, before December 4, 1902, know that Booty had received any part of the mortgage money, and the propriety of the defendant's conduct after that date was not questioned; at that date it was impossible to recover the money which Booty had received. The defendant, from the time when Booty was entrusted with the custody of the reconveyance (which, with the mortgage deed, remained in Booty's custody), frequently inquired of Booty whether he had received the money, and was always told that Booty had not received it, but that the matter would be completed shortly.

The action was tried with witnesses before Parker J. on October 17 and 18, 1910.

Martelli, K.C., and *John Henderson*, for the plaintiffs. The defendant's knowledge of the conduct of Booty with reference to the Shuttleworth trust funds was sufficient to shew him or any ordinarily prudent person that Booty was not a person who ought to be trusted with the receipt of the mortgage money. Sect. 17, sub-s. 1, of the Trustee Act, 1893, which will be relied on by the defendant, provides that a trustee may appoint a solicitor to be his agent to receive and give a discharge for any money receivable by the trustees under the trust, by permitting the solicitor to have the custody of, and to produce, a deed containing any such receipt as is referred to in s. 56 of the

Conveyancing and Law of Property Act, 1881, and that a trustee is not to be charged with breach of trust merely because he has made or concurred in making any such appointment, and that the producing of any such deed by the solicitor is to have the same validity and effect under the said section as if the person appointing the solicitor had not been a trustee. The plaintiffs are not contending that the death of the defendant's co-trustee revoked the authority conferred on Booty, or that he, if he was a proper person to be allowed to receive money,—which the plaintiffs say he was not, as the defendant well knew—should not have been allowed to receive the money in instalments; but the defendant is liable, if on no other ground, because he allowed Booty to retain the money longer than was reasonably necessary. Sub-s. 3 of s. 17 of the Act of 1893 says that nothing in the section is to exempt a trustee from any liability which he would have incurred if the Act had not been passed, if he permits the money to remain in the hands or under the control of the solicitor for a period longer than is reasonably necessary to enable the solicitor to pay the same to the trustee.

[PARKER J. referred to *Speight* v. *Gaunt.* (1)]

In that case, as in *In re Lord de Clifford's Estate* (2), there was a legitimate transaction which could only be carried out by employing an agent and entrusting him with trust money. Sect. 17 of the Act of 1893 does not authorize a trustee to employ a solicitor in the same way as he would employ a broker, who is a principal. A trustee who leaves trust money in a solicitor's hands for such a period as was allowed for the retention in this case commits a gross breach of trust: *Wyman* v. *Paterson.* (3) The provision of the Trustee Act, 1888, which s. 17 of the Act of 1893 replaced, was passed in consequence of *In re Bellamy and Metropolitan Board of Works.* (4) Booty ought not to have been allowed to retain possession of the reconveyance for so long a period. [They also referred to *Bostock* v. *Floyer.* (5)]

Romer, K.C., and *Whinney*, for the defendant. The defendant

(1) (1883) 9 App. Cas. 1.
(2) [1900] 2 Ch. 707.
(3) [1900] A. C. 271.
(4) (1883) 24 Ch. D. 387.
(5) (1865) L. R. 1 Eq. 26.

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is under no liability. He bona fide believed in the honesty of Booty, and his conduct throughout shews that he, as a reasonable person, had no ground for mistrusting Booty. The defendant did not know that Booty had in fact received any part of the mortgage moneys. The defendant did everything that a trustee, acting reasonably, could be expected to do. He asked from time to time whether the money had been received, and received replies in the negative. If he had asked for the reconveyance, it would have been shewn to him. No case is made out to shew that the defendant permitted any mortgage moneys to remain in Booty's hands or under his control for a period longer than was reasonably necessary to enable him to pay the money to the defendant. The defendant is certainly under no liability on the ground that he has failed to use such precautions as are required from a person, trustee or not, in relation to funds of other persons which it is his duty to protect.

Martelli in reply.

PARKER J. I have some little difficulty in dealing with this case, partly because I am not satisfied that the footing on which it has been argued—and which has assumed certain propositions of law—is really the true footing. The case has been argued by both sides on the footing that the death of Colonel Harvey, shortly after the reconveyance and before any money had been received under it, does not affect the question of the defendant's liability—in other words that the defendant is in the same position as if he had been a sole trustee and had alone executed the reconveyance. The case has also been argued by Mr. Martelli, if not by Mr. Romer, on the footing that the authority conferred by the reconveyance justified the payment by the mortgagors and the receipt by the solicitor of the mortgage money in instalments, and that the reconveyance became, in the events which happened, an operative reconveyance, although, on the evidence before me, it is uncertain whether or not the whole mortgage money was actually paid under the reconveyance to the solicitor, or whether, when the final instalment was made, if there was a final instalment, the earlier instalments were still intact in the hands of the solicitor.

I propose to decide this case on the footing on which it has been argued by Mr. Martelli without expressing an opinion as to whether that footing is really the correct one at law. Indeed some of the points assumed by that argument may affect persons not at present before the Court, and on some of them I think further evidence would be required before I could possibly decide them.

The facts of the case are these. The trust fund in question consisted of a sum of 10,000*l.* invested on mortgage. The mortgage was in the summer of 1902 about to be paid off, and a Mr. Booty, the solicitor of the mortgagees, who were trustees, procured the execution by them of an indenture of reconveyance, which, by virtue of s. 17 of the Trustee Act, 1893, when committed, as it was, to his custody, authorized him to receive the mortgage money on the trustees' behalf, and, on the footing on which the case has been argued, on behalf of the survivor if either died. The trustees could not be held liable merely because they had conferred this authority on their solicitor. But it is contended that the defendant, who is the surviving trustee, is liable to make good the trust funds, which were subsequently received and misappropriated by Booty, because (it is said), first, the defendant knew or ought to have known that Booty was not a fit and proper person to receive the trust money at all, and, secondly, because of the defendant's conduct after the reconveyance had been executed and entrusted to Booty's custody.

It is, in my judgment, absolutely clear that the defendant completely trusted in Booty's honesty and bona fide thought that he was a fit and proper person to be authorized to receive the trust money, and the only question upon this part of the case is whether certain facts which were known to him at the time ought to have led him to a contrary belief. It appears that the defendant was one of the trustees of another trust fund, also invested on mortgages, of which a Mrs. Shuttleworth was tenant for life. Apparently the trustees of this fund had authorized the mortgagors to pay the interest on the mortgage money to Booty, as solicitor for the tenant for life—at any rate, it was admitted by Mr. Martelli that Booty was receiving the interest on the tenant

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for life's behalf. Now Booty had for some years received this interest without accounting for it to Mrs. Shuttleworth, and she, when she became aware of the fact, had complained to the trustees. Booty excused himself to Mr. Money-Kyrle, one of the trustees, who had written to him on the subject, partly on the ground of overwork and partly because, he stated, he had a cross-claim against Mrs. Shuttleworth for costs. This appears to have been true, for a letter is in evidence in which Mrs. Shuttleworth admits that Booty's cross-claim against her is approximately equal in amount to her claim against him for the interest on the mortgages. But neither Mrs. Shuttleworth nor her trustees admitted the validity of Booty's excuse, and Booty, under pressure from the trustees,—or rather, I think, from Mr. Money-Kyrle—paid Mrs. Shuttleworth the interest notwithstanding his cross-claim and promised a full statement of his account with her. Up to this point, at any rate, no one had suggested any dishonesty on Booty's part, though it was suggested that he had been both careless and dilatory in the matter. He certainly was dilatory in furnishing the statement of account which he had promised, and on January 22, 1902, Mr. Money-Kyrle wrote to Booty complaining of this and calling his attention to the fact that the last half-year's interest on one of the mortgages, due in October, had not yet been paid into Mrs. Shuttleworth's account. On January 25, Mr. Money-Kyrle again writes to Booty on the matter, referring to the considerable sum still due to Mrs. Shuttleworth, for which he says the trustees are accountable. On January 28, Booty writes in reply as follows: "We are sorry it is not in our power to let you have the statement by to-morrow morning, but, with reference to your remark that there is still a considerable sum for which the trustees are accountable to Mrs. Shuttleworth, that, we think, is a mistake. The last half-year's interest on the Evelyn mortgage has been paid to Mrs. Shuttleworth's account at her bankers, and the only other item of income of trust property outstanding that we know of is the very small sum in respect of share of the rent of the house in Soho due at Christmas last, and which has not yet been paid." I gather, though there is no real evidence on the point, that Booty on January 28, the day on which he wrote that letter,

sent a cheque for the interest on the Evelyn mortgage to Mrs. Shuttleworth's bankers, and that the cheque was credited to her account on January 29. Mr. Money-Kyrle ascertained this shortly afterwards, and thereupon stigmatized Booty's letter of January 28 as containing a suggestio falsi—a false suggestion that the sum in question had been paid between January 22, when Mr. Money-Kyrle first wrote, and January 25, when he wrote for the second time, mentioning the considerable sum due, and he further stigmatized the suggestion as dishonest, and told his co-trustee, the defendant, that he could not further employ Booty as his solicitor. The defendant, thereupon, had an interview with Booty and discussed the matter with him, and the result on the defendant's mind of this interview is stated by him at the time in a letter of February 11, 1902, in which he says: "I know and have known him"—Booty—"for three generations of my family, and always found him a good lawyer, but dilatory as to details, and more so lately. I trust him. He has some of my business and some of my mortgages in his office. I advise leaving him for a year, seeing if he is prompt, and, if he returns to his old ways, having a meeting of trustees and deciding upon something further. If you adhere to your resolution to change after the statement, kindly call a meeting of trustees at Booty's office, and I will endeavour to come."

Now, whether or not Booty's letter of January 28 did contain a false suggestion, it appears to me that, under the circumstances known at the time to the defendant, it was not unreasonable, especially having regard to the number of years he had known Booty and had found him a satisfactory solicitor and an honest adviser, that the defendant should come to or retain this opinion of his honesty. It is quite clear that the conclusion which the defendant stated in his letter of February 11, 1902, was his real bona fide conclusion in the matter, and, when his co-trustees of the Shuttleworth fund determined, with Mrs. Shuttleworth's approval, to change their solicitor, the defendant felt it incumbent on him to resign and he did resign his trusteeship, he himself continuing to employ Booty in his own affairs. It seems to me, therefore, that the plaintiffs' contention on the first part of the case fails. Next, it is said that the defendant cannot rightly rely upon s. 17,

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sub-s. 1, of the Trustee Act, 1893, because, within the meaning of sub-s. 3 of that section, he permitted the mortgage money to remain in the hands or under the control of Booty for a period longer than was necessary to enable Booty to pay or transfer the money to him. In my judgment, to bring the 3rd sub-section of s. 17 into operation the circumstances must be such that the trustee knew, or ought to have known, of the receipt of the money by the solicitor. In this case the defendant, admittedly, did not know of the receipt by Booty of any part of the mortgage money before December 4, 1902, and no question is raised as to the propriety of his conduct after that date—indeed, at that time matters had gone so far that it would have been impossible to recover the money which Booty had received for him.

But there remains the question, Ought the defendant to have known that Booty had received any part of the mortgage money? It appears that the defendant, from the time when the deed was entrusted to Booty's custody, frequently inquired of Booty whether he had received the money, and was invariably told that Booty had not yet received the money, but that the matter would be completed shortly. I think it possible that, in writing to that effect, Booty may have thought that he was not authorized to receive the money in driblets, and was waiting until the whole money had been received before he was in a position to say that he had acted upon the authority constituted by the delivery to him of the executed reconveyance.

Meanwhile, however, Booty was proceeding as follows: He appears, though there is no evidence that the defendant knew this, to have been acting for the mortgagors, and, having obtained the reconveyance from the trustees, who were the mortgagees, he proceeded, acting on behalf of the mortgagors, to sell the property for them in lots. He made use of the reconveyance to make out a title to the lots sold to the various purchasers, giving them—according to the facts as stated by counsel, and as to which I gather that there is no dispute—statutory acknowledgments for the production of the mortgage deed and of the reconveyance, which, nevertheless, he retained in his own custody. In this way he, from time to time, received the purchase-money of the various lots sold, and he appears to have paid what he

received into his own banking account, and ultimately to have misappropriated it by converting it to his own use. I do not think that the defendant, who was unaware of what was going on, acted either unreasonably or dishonestly in believing what he was told by his solicitor, or that I ought to hold him liable for a breach of trust because he was deceived by a man whom he had no reason to mistrust. He had no means of checking what he was told, except, perhaps, by asking to see the reconveyance and mortgage deed, and, had he asked to be shewn the deeds, I can have no doubt that he would have been shewn them, because they were throughout, at all material times, in the possession of his solicitor.

Under these circumstances it seems to me that I ought not to hold that the defendant must have notice imputed to him of the receipt by his solicitor, under the reconveyance, of any part of the mortgage money. It appears, I should add, that upon one occasion at least the solicitor stated in a letter what was really the fact, that the reconveyance still remained in his possession.

Lastly, it is suggested that the defendant is liable because he left the reconveyance for too long a period in the hands of his solicitor. Now the authority intended to be conferred by entrusting Booty with the reconveyance was, of course, a continuing authority intended to be acted on as and when the transaction was ripe for completion. I find that the defendant was throughout expecting that the matter would be completed forthwith, and that the authority might require to be acted on at any moment. Under these circumstances the defendant was, I think, justified in not revoking the authority, which he would have done if he had withdrawn the deed from the solicitor's custody, for it is only by permitting the solicitor to have the custody of the deed that the statutory authority is conferred.

Of course, if this case had been framed on the footing that the death of Colonel Harvey revoked the authority, different questions might have arisen, for then the defendant's liability, if any, would have depended on his having left in his solicitor's hands a deed which, if it was to be used at all, could only be used in fraud. But that point has not been raised and, as I

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said at the commencement of my judgment, I am deciding this case on the footing on which it has been argued by Mr. Martelli, expressing no opinion upon points of law which otherwise might have arisen or which might have been taken by counsel.

Therefore, I do not see my way, as a result of the action, to hold that the defendant—whose absolute integrity and honesty are as clear as they well could be—has been guilty of any breach of trust or is under any liability in respect of this trust fund. The action, therefore, will be dismissed.

Solicitors for plaintiffs: *Dawes & Sons.*
Solicitors for defendant: *Lyne & Holman.*

F. E.

PARKER J. 1910 *Oct.* 24, 31.

In re BELDAM'S PATENT.

Practice—Patent—Revocation—Appeal—Time for appealing—Long Vacation—Extension of Time—Special Circumstances—Dilatoriness—Patents and Designs Act, 1907 (7 *Edw.* 7, *c.* 29), *s.* 26—*Rules of the Supreme Court*, 1883, *Order* LIII.A, *r.* 4; *Order* LVIII., *r.* 15; *Order* LXIV., *r.* 7.

On August 4, 1910, the comptroller refused an application for revocation of a patent. The applicant thereupon instructed his solicitors to take the necessary steps to appeal, but their clerk who was in charge of the matter had gone away for his holidays, and nothing was done till the end of August, when instructions were sent to counsel to prepare a petition for appeal. He was away from London and wrote that he had no facilities for drawing it and could not do so. This letter reached the solicitors on September 2, too late to make an application in chambers or instruct other counsel. The time limited by Rules of the Supreme Court, 1883, Order LIII.A, r. 4, for presenting a petition for appeal expired on September 4:—

Held, that time included in the Long Vacation must be counted in ascertaining the month allowed for appealing, and therefore that the appeal was out of time; and, further, that dilatoriness was not a "special circumstance" within Rules of the Supreme Court, 1883, Order LIII.A, r. 4, so as to enable the applicant to obtain an enlargement of the time.

SUMMONS for an order that the time for appealing against a decision of the Comptroller-General of Patents, Designs, and Trade Marks might be extended for one month from the date of the summons.

Mr. W. Turner applied to the comptroller under s. 26 of the

Patents and Designs Act, 1907, for the revocation of a patent belonging to Mr. G. W. Beldam. On August 4, 1910, the comptroller refused the application and sent a copy of his decision to Mr. Turner, who, within a few days, instructed his solicitors to take the necessary steps to appeal against the decision. The clerk who had charge of the matter had gone away for his holidays, and by some mistake the principals of the firm were not informed of the decision nor of their client's instructions. Towards the end of August they heard of them and instructed counsel to prepare a petition for appeal. He was away from London, and wrote in reply that he had no facilities for drawing the petition and could not do so, but that in his opinion the period of the Long Vacation need not be reckoned in the time. This letter reached the solicitors on Friday, September 2, too late to make any application in vacation chambers or instruct other counsel. The Master did not sit on Saturday, so no application for extension of time could be made before the expiration of the calendar month from the date of the comptroller's decision which by Rules of the Supreme Court, 1883, Order LIII.A, r. 4, is the period allowed for presenting a petition of appeal. The solicitors, therefore, wrote to Mr. Beldam's agents asking for further time, and were told in reply that Mr. Beldam was abroad, that his agents would get his instructions on the point, and that the time occupied by the correspondence would not be counted against the applicant. On September 24 Mr. Beldam's agents wrote that he was unable to agree to an extension of time. This summons was accordingly taken out, and in his affidavit Mr. Beldam said that he was not in a position to give an extension of time, as he had made arrangements with a syndicate for dealing with his patent rights on the assumption that there would be no appeal, and that an appeal would have a prejudicial effect on their capital. Two questions were raised, namely, first, whether the time for appealing had expired, and, secondly, if so, whether it ought to be extended; and these points were argued separately.

Douglas Leechman, for the applicant. An application to the comptroller for revocation of the patent under s. 26 of the

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Patents and Designs Act, 1907, was dismissed by him early in August, 1910. Sub-s. 4 of that section provides that "any decision of the comptroller under this section shall be subject to appeal to the Court." By Rules of the Supreme Court, 1883, Order LIII.A, r. 4, "all appeals to the Court from any decision of the comptroller under sections 20, 26, or 27 of the Act shall be brought by petition presented to the Court within one calendar month of the decision of the comptroller or within such further time as the Court may under special circumstances allow." It is submitted that the one month allowed for presenting the petition did not begin to run from the date of the comptroller's decision, but only began to run when the Long Vacation ended.

By s. 100 of the Judicature Act, 1873, "in the construction of this Act, unless there is anything in the subject or context repugnant thereto, 'petitioner' shall include every person making any application to the Court, either by petition, motion, or summons, otherwise than as against any defendant," and "'pleading' shall include any petition or summons."

In certain cases mentioned in Rules of the Supreme Court, 1883, Order LXIV., r. 4, of which this is not one, pleadings may be delivered in the Long Vacation; but by r. 5 of the same Order, "Save as in the last preceding rule mentioned, the time of the Long Vacation in any year shall not be reckoned in the computation of the times appointed or allowed by these Rules for amending, delivering or filing any pleading unless otherwise directed by the Court or a judge."

The petition being a pleading, there was no need to file it in the Long Vacation. [He also referred to the Annual Practice, 1911, vol. ii. p. 706.]

W. M. Cann, for the respondent. The applicant is out of time. Sect. 100 of the Judicature Act, 1873, is only the interpretation clause of that Act, and, moreover, the definitions there given only apply where there is nothing in the subject or context repugnant thereto. There is in this case no "amending, delivering or filing" of a pleading within the meaning of Rules of the Supreme Court, 1883, Order LXIV., r. 5.

The petition in this case is nothing more than an appeal or notice of an appeal, and the practice is that which governs

appeals generally. [He also referred to the Annual Practice, 1911, vol. i. p. 1007].

Leechman in reply.

PARKER J. Order LIII.A, r. 4, provides that all appeals to the Court from any decision of the comptroller under ss. 20, 26, and 27 of the Patents and Designs Act, 1907, shall be brought by petition, presented to the Court within one calendar month of the decision of the comptroller, or within such further time as the Court may under special circumstances allow. The question which I am asked to decide is whether the period of the Long Vacation counts or does not count in the one calendar month within which the appeal is to be brought. In my judgment it does count.

It is said that the period of the Long Vacation does not count because by Order LXIV., r. 5, it is provided that the time of the Long Vacation in any year shall not be reckoned in the computation of the time appointed or allowed by these Rules for amending, delivering, or filing any pleading unless otherwise directed by the Court or a judge. The petition of appeal from the comptroller's decision is not an amendment, delivery, or filing of anything whatever, and, that being the case, it does not appear to me to be relevant to refer to the fact that by s. 100 of the Judicature Act, 1873, the word "pleading" is to include a petition, more especially when it is borne in mind that the first enacting part of s. 100 refers only to a case where there is nothing in the subject-matter or context repugnant to such a construction.

It seems to me that this is an ordinary notice of appeal, to be given within the time limited by the Rules, and that I should be wrong in holding that, having regard to Order LXIV., r. 5, that time is extended by any portion of time which may fall within the Long Vacation. In my judgment the wording of that rule does not include a petition of appeal under Order LIII.A, r. 4; and if it did include it, the rule would have no application in the particular case because there is no direction in Order LIII.A for amendment, or delivery, or filing of the petition.

F. E.

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Oct. 31. *Douglas Leechman.* If time which comes in the Long Vacation is to count, this appeal is out of time, so we ask for an enlargement of the time for appealing. The Court has power under Rules of the Supreme Court, 1883, Order LIII.A, r. 4, to extend the time under special circumstances. We suggest as special circumstances sufficient to support our application the fact that all the applicant's advisers were away and by inadvertence the matter escaped attention, and that we were advised that the Long Vacation did not count. Mistakes of counsel are a sufficient ground under this rule for extending the time: *Baker* v. *Faber* (1); *Rumbold* v. *London County Council.* (2)

W. M. Cann, for the patentee. Those cases were decided under different rules, and no sufficient special circumstances have been shewn to bring this application within Rules of the Supreme Court, Order LIII.A, r. 4. The patentee is not in a position now to consent to an extension of time.

Leechman in reply.

PARKER J. This is an application under Order LIII.A, r. 4, for the enlargement of the time for appealing.

It appears that an application was made to the comptroller under s. 26 of the Patents and Designs Act, 1907, for the revocation of a patent, and the decision of the comptroller was in favour of the patentee, and the patent was upheld. That decision was communicated to the parties on August 4 of this year. The time for appealing, as both parties admit, is one calendar month from that date unless the Court extends the time, which it can only do under special circumstances. The special circumstances alleged are that the decision was communicated to the parties after the commencement of the Long Vacation, and that when counsel was instructed to settle the petition of appeal he was away in the country and had not the necessary facilities for settling a petition of that sort. The facts, however, are that almost immediately after August 4 the firm of solicitors who were acting for the petitioner received instructions to appeal, and those instructions would in ordinary course have been handed on, as I gather, to the managing clerk; but the managing clerk

(1) [1908] W. N. 9. (2) (1909) 100 L. T. 259.

was away for his holidays. The principals neglected to see that the work usually entrusted to him was carried out by some one else, and when he came back it was within only a few days of the expiration of the time fixed for presentation of the petition of appeal. Under those circumstances, when counsel intimated that he could not carry out the instructions because of absence during the Vacation, there was no time to instruct anybody else, and the time expired. The question is whether those circumstances are sufficient to justify me in extending the time under the rule. In my opinion they are not.

I do not think I need refer to the cases in the Court of Appeal which have been cited on an analogous rule, but it appears to me that the real reason of the appeal not having been made in time in this case was dilatoriness on the part of the petitioner's agents. The dilatoriness was no doubt caused by the fact that the Long Vacation was going on, but there was certainly dilatoriness on their part, and I do not think I ought to decide that the action of the firm in that respect ought to be put forward as a ground for enabling the petitioner to obtain an enlargement of time. In the present case I do not think that any harm will really be done, for the petitioner can, under another section of the Act, if he desires to revoke the patent, proceed, not before the comptroller, but by a petition to the Court under a fiat of the Attorney-General. Under the circumstances, therefore, it seems to me that I ought to refuse the application.

Solicitors: *G. S. Warmington & Edmonds; Burgess, Cosens & Co.*

H. C. R.

PARKER J.

1910

Oct. 20 ;
Nov. 7.

In re FIAT MOTORS, LIMITED'S APPLICATION.

[1910 F. 072.]

Patent—Revocation—Patented Article or Process manufactured or carried on exclusively or mainly out of the United Kingdom—Articles manufactured in the United Kingdom in infringement of Patent—Patents and Designs Act, 1907 (7 *Edw.* 7, *c.* 29), *s.* 25, *sub-s.* 2 ; *s.* 27.

On an application for revocation of a patent on the ground that the patented article or process is manufactured or carried on exclusively or mainly outside the United Kingdom, the Comptroller of Patents, in computing the extent to which the article or process for which the patent has been obtained is, within the meaning of s. 27, sub-s. 1, of the Patents and Designs Act, 1907, manufactured or carried on within the United Kingdom, ought not to inquire whether what has been done in the United Kingdom is or is not in derogation of the patentee's rights under his patent, or to exclude from the computation what has been done by infringers of the patent in derogation of those rights.

Quære whether s. 27, sub-s. 2, of the Act does not render lawful everything done while the patent is revocable, although it would otherwise be an infringement.

The Mercedes Daimler Motor Company, Limited, was the proprietor of seven patents, numbered respectively 7271 of 1899, 7272 of 1899, 9805 of 1899, 21,652 of 1900, 3235 of 1901, 6976 of 1902, and 28,259 of 1902.

A company called Fiat Motors, Limited, applied to the Comptroller of Patents, Designs, and Trade Marks under s. 27 of the Patents and Designs Act, 1907, for the revocation of the patents on the ground that the articles thereby patented were manufactured exclusively or mainly outside the United Kingdom. The evidence shewed that there was a considerable manufacture abroad in the case of the more important of the patented articles and a very limited manufacture in the United Kingdom by the patentees or under licences granted by them. It was admitted, however, that in addition to this manufacture there was in the United Kingdom an extensive manufacture of the patented articles by infringers of the patent, and that if this infringing manufacture had to be taken into account it would be

difficult, if not impossible, for the applicants to discharge the onus of shewing that the patented articles were manufactured mainly outside the United Kingdom. The comptroller was, therefore, asked to decide the preliminary question, Whether, in comparing the manufacture at home and abroad, the amount of manufacture by infringers in this country could be taken into consideration, or whether the only manufacture in this country upon which the patentees could rely was manufacture by them or their licensees under the patents.

The comptroller was of opinion that the point had in effect been decided by Parker J. in *In re Hatschek's Patents, Ex parte Zerenner* (1), and he decided that the patentees were entitled to rely on the infringing manufacture in this country.

The applicants for revocation appealed to the Court, and the appeal was heard by Parker J. on October 20, 1910.

Sir C. A. Cripps, K.C., and *R. Mortimer Montgomery*, for the appellants. An application under s. 27, sub-s. 1, of the Patents and Designs Act, 1907, for revocation of a patent must be "on the ground that the patented article or process is manufactured or carried on exclusively or mainly outside the United Kingdom." If he is satisfied that the allegations in the application are correct, the comptroller may, under sub-s. 2, subject to the provisions of the section,—"unless the patentee proves that the patented article or process is manufactured or carried on to an adequate extent in the United Kingdom, or gives satisfactory reasons why the article or process is not so manufactured or carried on"—revoke the patent, and that either "(*a*) forthwith, or (*b*) after such reasonable interval as may be specified in the order, unless in the meantime it is shown to his satisfaction that the patented article or process is manufactured or carried on within the United Kingdom to an adequate extent." Then it is provided by sub-s. 3 that if within the time so limited "the patented article or process is not manufactured or carried on within the United Kingdom to an adequate extent, but the patentee gives satisfactory reasons why it is not so manufactured or carried on," the comptroller may extend the time. Now the Act was certainly not passed for

(1) [1909] 2 Ch. 68.

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the benefit of infringers of patents, and it does not enable them to rely wholly or partly on the manufacture of the patented article in this country, by persons who are thereby infringing the patent, as manufacturers "to an adequate extent in the United Kingdom." A "patented article" is an article manufactured under the patent by the patentee or a person licensed or authorized by him to manufacture it. Sect. 89 of the Act makes it an offence falsely to represent an article sold by him as a patented article. The comptroller thought the question was decided in *In re Hatschek's Patents, Ex parte Zerenner.* (1) But that is not correct. The question now raised was not before the Court in that case. If *In re Hatschek's Patents* (1) decided that a "patented article" was any article manufactured under the British patent, it was meant to be qualified by the word "lawfully."

[PARKER J. How can you tell how the things are made or what agreements there are between the patentee and the alleged infringers ?]

It is for the patentee to satisfy the Court on that head. By s. 93 of the Act, unless the context otherwise requires, "'patentee' means the person for the time being entitled to the benefit of a patent"; and if the comptroller is right, infringers, if they manufacture the patented article, are within that definition.

[PARKER J. Sect. 25, sub-s. 2, says that "every ground on which . . . . a patent may be revoked under this Act . . . . shall be available by way of defence to an action of infringement." So it may be said that there is no infringement by making the patented article without licence if the patent is revocable.]

In that case, if the comptroller is right, a person who had infringed to only a small extent would, unless adequate manufacture in England by other infringers was shewn, be able to get off scot free when the patentee or his licensees did not manufacture here. There is nothing in *In re Bremer's Patent, Ex parte Braulik* (2), to support the comptroller's decision.

Sir Rufus Isaacs, A.-G., and *Sargant*, for the Law Officer. This

(1) [1909] 2 Ch. 68. (2) [1909] 2 Ch. 217.

seems to be a convenient time for the view of the Law Officer to be laid before the Court, although it is not intended to lose, what is generally allowed in a case like this, the right to speak after counsel on the other side have addressed the Court. The only argument put forward on behalf of the Law Officer is one which is based on public interest, and it is in that interest that it is desired that the appeal should succeed.

[PARKER J. Suppose that the Court can go back on its decision as to what is a patented article, can you say that manufacture to an adequate extent in the United Kingdom is limited to manufacture by the patentee and his licensees?]

The words should be read as referring only to lawful manufacture. Sect. 27 was meant to promote the development of new industries in the United Kingdom and to prevent interference with old ones.

[PARKER J. In considering whether a patent should be revoked or not, must not the volume of manufacture abroad be compared with the volume of manufacture here, however the latter is arrived at?]

Only the volume of manufacture abroad need be considered, but in ascertaining the volume of manufacture in this country articles manufactured in defiance of the law ought not to be taken into account. Sect. 27 throws on the patentee the burden of shewing that there is adequate manufacture within the United Kingdom or of giving satisfactory reasons why there is not such manufacture, and it is strange if he can call in aid, to avoid revocation, the unlawful acts of the infringers of his patent.

A. J. Walter, K.C., and *J. Hunter Gray*, for the patentees. There is no abuse of monopoly to the prejudice of the British manufacturers while the latter in fact are manufacturing in the United Kingdom to an extent greater than the patented article is manufactured abroad. The issue in *In re Hatschek's Patents* (1) was as to what was a "patented article," and according to that case it meant an article manufactured in accordance with the patent. The term cannot be read in two different senses in the same section. It is quite immaterial to inquire who

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manufactured the article. If *In re Hatschek's Patents* (1) is not a direct decision on the question now before the Court, the principles of that case are applicable.

There is no difficulty under s. 25 of the Act, which is simply a provision with respect to procedure—that is to say, that if a man is sued for infringement, he may, instead of applying for revocation, set up by way of defence what he might allege as a ground for revocation.

Sect. 89 has no bearing on the case. If the Legislature had intended what the appellants contend for, it would have used apt words to express its meaning.

Sir C. A. Cripps, K.C., in reply.

Cur. adv. vult.

Nov. 7, 1910. PARKER J. In *In re Hatschek's Patents* (1) I had occasion to deal somewhat fully with the construction of sub-s. 1 of s. 27 of the Patents and Designs Act, 1907. I look upon that sub-section as defining the circumstances under which the Legislature has thrown upon the patentee the onus of defending his patent rights. To see whether such onus falls on the patentee in any particular case a comparison is instituted between the extent to which the article or process for which he has obtained his patent is manufactured or carried on abroad and the extent to which the same article or process is manufactured or carried on within the limits of the United Kingdom. The sub-section has, in my opinion, nothing to do with the extent to which the article, the subject of the patent, when made abroad, or the article resulting from the process, the subject of the patent, when carried on abroad, is or is not imported into the United Kingdom. Indeed, a process may very well be such that no article capable of importation is produced at all. Nor, again, has the sub-section, in my opinion, anything to do with the conduct of the patentee. The question is not what the patentee has done or left undone, but whether existing circumstances are such as, by raising an inference that he has done something which he ought not to have done, or omitted to do something he ought to have done, to throw upon him the onus

(1) [1909] 2 Ch. 68.

of justifying the use he has made of his monopoly. It follows that upon the inquiry under sub-s. 1 the comptroller is not concerned with the question whether what has been done abroad has been so done with or without the consent, licence, or co-operation of the patentee. The holder of the patent in the United Kingdom may or may not have corresponding patent rights in other countries. If he has such rights, they may or may not differ materially from his rights under his United Kingdom patent; and, again, his rights under his foreign patents, if any, may or may not be infringed by what is being done abroad. With all these matters the comptroller has no concern. He inquires simply as to the extent to which the article or process is in fact manufactured or carried on abroad. So much I have already decided in *In re Hatschek's Patents* (1), and I see no reason for modifying my decision.

The present case raises an analogous point with regard to the extent to which the article or process for which the patent has been obtained is, within the meaning of the sub-section, manufactured or carried on within the limits of the United Kingdom. In computing this extent, ought the comptroller to inquire whether what has been done in the United Kingdom is or is not in derogation of the rights of the patentee under his patent, and to exclude from the computation what has been done in derogation of such rights? I have come to the conclusion that he ought not. This appears to follow from what I decided in *In re Hatschek's Patents* (1), for it would be illogical and unfair to count against a patentee all that is done abroad without his licence, consent, or co-operation, and to count in his favour only what is done in this country by himself or his licensees, or otherwise, without derogating from his rights under the patent. Further than this, it seems to me impossible that the Legislature should have contemplated under sub-s. 1 an inquiry so far-reaching as to embrace the rights inter se of the patentee and everybody in the United Kingdom who is manufacturing the article or carrying on the process the subject of his patent. One man may be manufacturing the article or carrying on the process because he believes the patent is invalid; another,

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because he maintains that on the construction of certain correspondence between himself and the patentee he has a free licence; a third, because he contends that in equity the patent belongs to him; and yet a fourth, because he thinks that in an action for infringement he will have a defence under s. 25 of the Act. There may be all sorts of questions to determine before it can be decided whether what is being done in any particular case is in derogation of the patentee's rights or otherwise. The comptroller has quite enough to do in coming to a conclusion as to whether a particular article or process is in fact the article or process for which the patent has been obtained without entering into all these further questions; and in my opinion he is not, according to the true construction of the sub-section, concerned with these further questions at all.

It is suggested that this construction of the sub-section leads to an absurd result under s. 25 of the Act, because the greater the extent to which a defendant in an infringement action has infringed the patent the less chance he will have of defending himself under that section. I can see nothing absurd in this result. It is no hardship that a person who takes upon himself to manufacture a patented article or carry on a patented process without the patentee's consent should do so at his own risk. If in fact the patent is revocable under s. 27, his proper course is to proceed under that section to procure its revocation. The construction for which the appellants contend would, in my opinion, lead to results far more absurd. If, as is quite arguable, s. 25 of the Act renders lawful everything done while the patent is revocable, and which would otherwise be an infringement, then, logically speaking (if the appellants are right in their contention), the comptroller would have to decide the question of revocability before he could decide on the extent of manufacture in this country under sub-s. 1—in other words, before he could decide whether circumstances existed which would justify him in considering the question of revocability at all. I am of opinion, therefore, that for the purposes of sub-s. 1 it is quite immaterial whether the article or process manufactured or carried on in this country is or is not so manufactured or carried on in derogation of the rights of the patentee under his

patent. The appeal, therefore, will be dismissed with costs, which will include the costs of the Attorney-General.

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Solicitors for appellants: *Amery Parkes, Macklin & Co.*
Solicitor for the Law Officer: *Solicitor to the Board of Trade.*
Solicitors for respondents: *Bristows, Cooke & Carpmael.*

F. E.

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Nov. 2.

[1909 M. 2722.]

Company—Directors—Power to increase Capital—Creation and Issue of Shares — Memorandum and Articles of Association — Alteration by Special Resolution—Validity — Shareholder — Acquiescence — Right to maintain Action.

The defendant company was incorporated in 1893 under articles of association which provided (article 53) that "the company in general meeting" might increase its capital by the creation of new shares. By a special resolution passed and confirmed in 1895, article 53 was altered so that the power of increasing the capital should no longer be exercised by the company in general meeting, but by "resolution of the directors." By article 59 any new shares from time to time to be created might from time to time be issued with such right of preference and generally on such terms as the company might from time to time by resolution of a general meeting declare. In 1903 the directors passed a resolution increasing the capital of the company. The plaintiff, a shareholder and former director of the company, was a party to the resolutions altering the articles and authorizing the issue of new capital. Having ceased to be a director, he brought an action, on behalf of himself and all other shareholders, to have it declared that the resolutions altering article 53 and increasing the capital were ultra vires, and that the directors had no power to issue new shares:—

Held by Eve J., [1910] 2 Ch. 382, that the company was acting within its powers in modifying the articles so as to give the directors power to increase its capital.

On appeal the respondents objected that the plaintiff, having been a party to the resolutions in question, was not entitled to maintain the action:—

Held that, inasmuch as the plaintiff was seeking to restrain proposed future illegal proceedings by the company, he was entitled to maintain the action.

Towers v. *African Tug Co.*, [1904] 1 Ch. 558, distinguished.

Held, further, on the construction of the articles, that, assuming the

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power of the directors to create new shares, they had no power in the absence of a resolution by the company to issue them.

APPEAL from a decision of Eve J. (1)

The plaintiff was a shareholder in the defendant company. He was also one of the original directors, but he resigned his seat upon the board in 1897. He brought this action, on behalf of himself and of all other shareholders of the company except the defendants, against the company and its directors to have it declared that the company was acting ultra vires in so modifying its articles as to give the directors power to increase its capital.

The capital of the company as stated in the memorandum of association was 125,200*l.* divided into 125,000 ordinary shares of 1*l.* each and two life governors' shares of 100*l.* each. Article 53 of the company's articles as originally framed provided as follows: "The company in general meeting may, from time to time, whether all the shares for the time being created shall have been issued or not, or all the shares for the time being issued shall have been fully called up or not, increase its capital by the creation of new shares, such aggregate increase to be of such amount, and to be divided into shares of such respective amounts as the company by the resolution creating such new shares directs. Provided that, save for the acquisition of new property, there shall be no increase of capital beyond an increase up to a nominal capital of 250,000*l.*, without the sanction of an extraordinary resolution."

At extraordinary general meetings of the company held on May 9, 1895, and May 27, 1895, the following special resolution was passed and confirmed:—"That in article 53 the words 'by resolution of the directors' be substituted for the words 'in general meeting' in the first line, and that the words 'the permanent directors or director whilst they or he shall hold office' be substituted for the words 'an extraordinary resolution' in the last line of the said article." This resolution was seconded by the plaintiff.

On September 28, 1896, the directors passed a resolution to

(1) [1910] 2 Ch. 382.

increase the capital of the company by the creation of 75,000 new ordinary shares of 1*l.* each. The plaintiff took part in the passing of that resolution, and 4930 of the new shares so created were allotted to him.

On December 4, 1903, the plaintiff having then resigned his directorship, the directors resolved "that the capital of the company be further increased by the creation of 125,000 new ordinary shares of 1*l.* each."

On November 4, 1909, the plaintiff brought this action, claiming (1.) a declaration that the special resolution passed and confirmed respectively on May 9 and May 27, 1895, and the resolution passed by the directors on December 4, 1903, were ultra vires; (2.) a declaration that the attempted issue of new shares pursuant to the resolutions was ultra vires; (3.) a declaration that the directors had no power to issue any new shares in the company; and (4.) an injunction to restrain the defendants from issuing or dealing with any new shares.

Eve J. held that, having regard to s. 12 of the Companies Act, 1862, and Sched. I., Table A, arts. 26, 55, and 68, the company had acted within its powers in so modifying its articles as to give the directors power to increase its capital, and he dismissed the action.

The plaintiff appealed, and upon the appeal he relied upon article 59 of the company's articles in addition to those relied upon in the Court below.

Article 59 provided, under the heading of "Preference Shares," as follows:—"Any new shares from time to time to be created may from time to time be issued with any such guarantee or any such right of preference, whether in respect of dividend or of repayment of capital, or both, or any such other special privilege or advantage over any other shares previously issued or then about to be issued (other than shares issued with a preference), or at such a premium, or with such deferred rights, as compared with any shares previously issued, or then about to be issued, or subject to any such conditions or provisions, and with any such right, or without any right, of voting, and generally on such terms as the company may from time to time by resolution of a general meeting declare."

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Buckmaster, K.C., and *H. Greenwood*, for the appellant. In the first place, a company cannot delegate the power of increasing its capital to the directors, and, in the second place, article 53 does not in terms and as a matter of construction delegate this authority to the directors.

[COZENS-HARDY M. R. If your second point is established the first point does not arise; you had better, therefore, argue the second point first.]

As a matter of construction article 53, as altered by the resolution of May, 1895, only authorizes the directors to create and not to issue new shares. Under the terms of article 59 the directors have no power to issue new shares without the sanction of a resolution of a general meeting.

Upjohn, K.C., *Jessel, K.C.*, and *J. W. M. Holmes*, for the respondents. This objection was not raised or suggested by the pleadings and cannot therefore be raised now.

There is a preliminary objection to the action. The plaintiff was a director when the resolution of May, 1895, was passed; in fact he seconded the resolution; he cannot, therefore, now bring an action impeaching the validity of this resolution. The man who originated the alteration in these articles cannot now be heard to say that the alteration is void and ultra vires: *Towers* v. *African Tug Co.* (1) Acquiescence is a good defence to this action. The plaintiff is estopped by his own conduct from averring that the resolution of May, 1895, was invalid.

As a question of construction article 53 does empower the directors to increase the company's capital. One resolution only is referred to, the resolution creating new shares, and the word "company" in the latter part of the article means the company by its directors. Article 59 cannot be taken as ruling out article 53. That article applies to the issue of new preference shares and is in its terms purely permissive and optional. There is nothing to prevent the directors from issuing and allotting new shares which have been properly created by them. The power of the directors to do this can only be taken away by special direction in the articles, and there is no such special direction.

(1) [1904] 1 Ch. 558.

COZENS-HARDY M.R. We will not trouble you, Mr. Buckmaster.

This appeal raises two points, one of which is of general importance, and the other of which is only of importance as affecting the construction of the articles of this particular company. The first point, which, as I say, is of general importance, is this. The plaintiff commences his action suing on behalf of himself and all other shareholders against the company and the directors, and he seeks to restrain an intended issue of a very large number of shares, which the plaintiff says are not authorized to be issued by the defendant company or the directors at the present time. Mr. Upjohn takes a preliminary objection to this effect. He says, "You, the plaintiff, were a moving party to the passing of the resolutions which authorized this issue. You, yourself, have taken certain shares under an earlier issue made in pursuance of those resolutions, and there is a personal exception to your position as plaintiff, and, whatever other shareholders might do, you at least cannot restrain the company from issuing these shares, even on the assumption that the issue is improper"; and for that proposition Mr. Upjohn cites the case of *Towers* v. *African Tug Co.* (1), which it is necessary for me to deal with. Now what was *Towers* v. *African Tug Co.?* (1) That was a case in which the directors had paid dividends out of capital, and the plaintiffs in that case sought, not an injunction or anything with reference to the future, but a personal order upon the directors to refund to the assets of the company the amount which had been wrongfully abstracted from the capital. The company retaliated by saying: "You, the plaintiffs, yourselves received this dividend with full knowledge of all the facts, and, by way of counter-claim, we ask that you will repay to the company the dividend which you have wrongfully received." That was an action in which, but for extraordinary circumstances, the company itself would have been the proper and the only proper plaintiff. I may observe that in the counter-claim the company recovered judgment against the plaintiffs in respect of these very dividends that they had in their pockets, and it is only under exceptional circumstances that anybody but the company

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is allowed to take proceedings to sue the very persons alleged to be liable to the company, whether in a fiduciary character as directors or in any other character. It is only under very exceptional circumstances that a plaintiff suing on behalf of himself and all other shareholders in a representative character is allowed to seek relief which properly or under any ordinary circumstances could be enforced by the company itself. In a case of that kind it was said in *Towers* v. *African Tug Co.* (1) that a plaintiff who had himself with full knowledge received a dividend, and still had it in his pocket, was not a person who could be allowed under the peculiar procedure of the Court to claim a remedy against the directors, which remedy prima facie ought to be enforced by the company, but, so far as I am aware, that doctrine has no application at all to a case where relief is not sought in respect of the past, but where what is sought is an injunction to restrain a wrong-doing in the future; and, indeed, it would be a little short of shocking to say that a person, who, it may be, in good faith, with knowledge of the facts, but in ignorance of the law years ago, did take a step which he now finds was improper, and who, as it may be, received shares or money in years gone by in respect of that transaction, is disabled from saying to the Court that what this company proposes to do in future is illegal and improper and asking the Court to restrain them from doing it. In the decision in the case of *Towers* v. *African Tug Co.* (1) (a decision to which I was myself a party, and which I see no reason whatever to question, if it were open to question) there is nothing, in my view, which has any bearing on the rights of a plaintiff suing not in a peculiar and irregular manner for the company or on behalf of the company, but suing in his own individual right as an individual shareholder seeking to restrain its future actions. There is nothing in that case, so far as I am aware, or in any other authority, and certainly nothing in principle, which prevents a plaintiff from saying "A wrong may have been done in the past—that is a matter with which we have nothing to do here—but you shall not do this wrong again in the future." In my opinion, there is nothing in the preliminary objection taken by Mr. Upjohn, assuming as I do

(1) [1904] 1 Ch. 558

the accuracy of all the facts which he opened on this point, which prevents us from considering this appeal.

Now this appeal really raises, in the view that I take, a point of construction which is of no general interest, but only of interest to this particular company. The capital of the company was originally fixed, of course, by its memorandum of association; it was 125,200*l.* divided into a certain number of ordinary shares, that is to say 125,000, and two 100*l.* life governors' shares. The articles as originally issued provided for increases of capital, and it provided, in that which is the more usual form, that the company may in general meeting increase its capital. I shall have to read the language of article 53 in more detail afterwards. By a special resolution that article was altered, and, as altered, it runs as follows: "The company by resolution of the directors may from time to time, whether all the shares for the time being created shall have been issued or not, or all the shares for the time being issued shall have been fully called up or not, increase its capital by the creation of new shares, such aggregate increase to be of such amount, and to be divided into shares of such respective amounts, as the company by the resolution creating such new shares directs." Then there is a proviso which I do not read, because in my point of view it has no bearing upon the case. There is also another article, namely, article 59, which, as I read it, deals with all new shares, whether they be preference shares or deferred shares or any other kind of special shares. Article 59 is in these words: "Any new shares from time to time to be created"—which is one thing—"may from time to time be issued"—then there comes a long parenthesis as to deferred rights and voting conditions, and then, "generally on such terms as the company may from time to time by resolution of a general meeting declare." In my opinion on the construction of that article 59 it extends to all new shares. It includes not only the shares which are either preferential or deferred, but all shares of any kind, and it says new shares are to be issued on such terms as the company may from time to time by resolution of a general meeting declare. If that be so, let us go back to article 53. I treat this as a mere question of construction. I assume in favour of the respondents, without

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expressing any opinion either for or against their view, that a resolution of the directors to increase the capital by the creation of new shares was not ultra vires. I also assume, again without expressing any concluded view upon the point, that the second limb of the section, namely, "such aggregate increase to be of such amount, and to be divided into shares of such respective amounts, as the company by the resolution creating such new shares directs," means as the company, acting by its board of directors, directs. I assume those two points in favour of the respondents. But that really only amounts to this, that the company acting by its directors may increase its capital by the creation of new shares. It does not give any power whatever to issue the capital so created, and, as I read article 59, there is an express and clear provision that any new shares as distinguished from the original authorized capital must be issued on such terms as the company may from time to time by the resolution of a general meeting declare. Now the issue of shares is something quite distinct from allotment. That, I think, Mr. Jessel really admitted, although at first he was disposed to contest it. The difference is apparent, and it is well known in company law. Therefore, assuming the validity of the resolution of the directors to create these new shares, in my opinion they have no power to issue them, and therefore no power to allot them in the absence of, and without and until, the resolution of the general meeting. I think, therefore, that what we should do, not interfering or saying anything about the past, is to say that the Court, being of opinion that new shares cannot be issued without a resolution of a general meeting, grants an injunction unless and until the resolution of the general meeting has been passed.

FLETCHER MOULTON L.J. I am of the same opinion. With regard to the first point, which the Master of the Rolls has rightly described as being of general importance, I cannot see any room for doubt. Here Alfred Mosely is the plaintiff, and he sues the company and, I believe, the directors to prevent an issue of shares which he says is ultra vires. Now it is quite true that he describes himself as suing on behalf of himself and all other shareholders of the defendant company except the defendants. The fact that he

sues in a representative character does not interfere with his suing in a personal character, and without dealing for the moment with his right to sue in a representative character, I ask myself has he a right to sue in his personal or individual character. As to that, it seems to me there can be no possible doubt. He is the holder of shares. He says that the directors are going to create shares ultra vires, which of course, if they are issued, might give rights in competition with his own. It must be the right of a shareholder by reason of his being a shareholder to bring an action to stop such a proceeding, so that he need not have added, in order to found this action properly, that he was suing on behalf of all other shareholders. He might have sued on behalf of himself alone, but in an action in which he is suing on behalf of himself I cannot see any objection to his joining with him all the rest of the shareholders who have like rights with him by reason of their being shareholders, and suing not only in his individual right, but also in a representative character.

The reference to *Towers* v. *African Tug Co.* (1) seems to me to be entirely misplaced. There the plaintiff was not suing in his own individual right. He was suing in order to force the company to which be belonged to assert certain rights. There, as he had no right to sue in his own individual character, as a plaintiff whose rights were being infringed, but was only suing on behalf of another person who he said was wrongfully abstaining from asserting rights in the exercise of which he was interested, he had to shew that he was a proper person to have granted to him the exceptional privilege of conducting as plaintiff the action of another person, i.e., the company, and it was obvious that he was not such a person by reason of his past history. Hence that authority applies to a totally different class of cases. Here a man is asserting rights which are his by virtue of his being a shareholder, and inasmuch as he is doing only what he has a right to do there is no objection to his asserting that he does it not only in his own capacity but also in a representative capacity.

Now, having disposed of that point, we come to a question which concerns this case alone, and which is purely a question of construction of the articles. It is a question which I think is not

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without difficulty, mainly on the ground which was so very ably put forward by Mr. Jessel in his argument. Here it is clear to me, and is in fact unquestioned, that originally the increase of capital was intended to be done by an act of the company in general meeting. An alteration was made in article 53 which prescribed this. The words "in general meeting" were struck out and the words "by resolution of the directors" were inserted in their place. The resolution effecting this did not make any further alteration, so that the language at the end of the sentence seems still to point to an act of the company, and points to it in a way in which one would ordinarily construe it as referring to an act of the company in general meeting. Whether or not if we were driven to construe this article we should take the view that the article had been imperfectly amended so that it did not carry out what I have no doubt was the intention of those who proposed the alteration, or whether we should be able to read the words so that it adequately carried out that intention, I am not going to decide. I am going to take it in favour of the defendants that it does adequately carry out the proposed change, and that under the new article 53 the directors can increase the capital of the company by the creation of new shares. Further, I do not decide whether such an alteration is a proper alteration or whether it would be ultra vires for the directors to create new shares whether that article were altered or not. I take both of those points in favour of the defendants without giving any decision on them. But now I ask myself whether there is under the proper construction of these articles the power to issue these shares. That turns on article 59, which says, "Any new shares from time to time to be created may from time to time be issued," whether preference or not, "generally on such terms as the company may from time to time by resolution of a general meeting declare." Now that exists in an unchanged shape side by side with the amended article 53, and I cannot read it without seeing that this article contemplates two acts, one the creation of shares, the other the issue of shares, and that the issue of shares comes subsequently in point of time to the creation. Then I find that article 59 obviously keeps in the hands of the company in general meeting the power of deciding the terms on

which shares are to be issued, and amongst other things the rights of voting. Mr. Jessel suggests that this is only permissive; that if the company in general meeting does not choose to prescribe anything, there is a power under article 53 or an inherent power in the directors, I do not know which, to issue shares identical in privileges and rights with some existing class of shares. He says that if you are issuing ordinary shares the company may interfere and give them special rights, but if it does not choose to interfere, the directors can issue them under article 53. I have therefore to ask myself whether article 59 is intended to control article 53. In the first place, it appears to me that article 59, by recognizing so clearly the two distinct things, the creation and the subsequent issue, is prima facie the article which is intended to regulate the power to issue, and I think it is intended so to do. But if this be so it must be intended to control article 53. Article 53 says that the new shares may be divided into shares of such respective amounts as, &c. Now, supposing that these shares were issued as 10*l.* shares. That gravely affects the rights of the parties, because there is one vote per share. However you choose to read article 59, it is evident that the company did not intend any new shares to be issued having peculiar rights without the decision of the company in general meeting. Therefore it must have contemplated that the creation of shares under article 53 would not necessarily carry with it the issue. I therefore think that, reading the two articles together, the better construction is to say that article 59 was meant to give the authorization to issue shares, and that, in spite of their being created under article 53, they could not be issued without the authority of the company in general meeting according to article 59. For these reasons I am of opinion that this appeal must succeed.

FARWELL L.J. I am of the same opinion on both points. On the first point, it is in my opinion a misapprehension to suppose that *Towers* v. *African Tug Co.* (1) has any bearing whatever on a case of this description. As Stirling L.J. (2) says, "Why is it that this form of action is allowed? Prima

(1) [1904] 1 Ch. 558. (2) [1904] 1 Ch. 569.

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facie the proper plaintiff, where it is sought to bring back the property of the company into its own coffers, is the company itself." Then he gives the exception to the rule. The complaint in that case was that the company had lost certain moneys which its directors had paid away wrongly, and it sought to recover them. Obviously the proper plaintiff was the company, but there are exceptions which the Lord Justice points out. This is not that case at all. This is an action by a shareholder to restrain further ultra vires acts, and certainly ever since the Lord Chancellor in *Simpson* v. *Westminster Palace Hotel Co.* (1) laid down the law more than half a century ago, I never heard it doubted. He says, "The funds of a joint stock company established for one undertaking cannot be applied to another. If an attempt to do so is made, this act is ultra vires, and although sanctioned by all the directors and by a large majority of the shareholders, any single shareholder has a right to resist it, and a Court of Equity will interpose on his behalf by injunction." The fact that this shareholder participated in a similar ultra vires act in the past cannot have the effect of preventing him from complaining of the repetition thereof in the future.

As regards the construction of these particular articles it is plain that the words "creation," "issue," and "allotment" are used with the three different meanings familiar to business people as well as to lawyers. There are three steps with regard to new capital; first, it is created; till it is created the capital does not exist at all. When it is created it may remain unissued for years, as indeed it was here; the market did not allow of a favourable opportunity of placing it. When it is issued it may be issued on such terms as appear for the moment expedient. Next comes allotment. To take the words of Stirling J. in *Spitzel* v. *Chinese Corporation* (2), he says: "What is an allotment of shares? Broadly speaking, it is an appropriation by the directors or the managing body of the company of shares to a particular person." When one bears this in mind the articles present very little difficulty. Article 53 gives a power to create and create only. It is not suggested that it gives any power to issue at all. Article 59 does

(1) (1860) 8 H. L. C. 712, 717. (2) (1899) 80 L. T. 347, 351.

not give this power as regards new shares. I read article 59 as applying to all new shares notwithstanding the head-note as to preference shares, which is obviously inaccurate. It provides that "Any new shares from time to time to be created may from time to time be issued with any such guarantee or any such right of preference, whether in respect of dividend or of repayment of capital, or both, or any such other special privilege or advantage over any other shares previously issued or then about to be issued (other than shares issued with a preference), or at such a premium, or with such deferred rights, as compared with any shares previously issued, or then about to be issued, or subject to any such conditions or provisions, and with any such right, or without any right, of voting, and generally on such terms as the company may from time to time by resolution of a general meeting declare." It seems to me that the power was intended to be as wide as possible, and to give to the general meetings the power of dealing with the terms on which an issue should be made when and as that issue is decided upon. Reference was made to article 93, but that really has no bearing, because it excludes the acts required to be done by the company in general meeting under the articles, and this was required to be done in general meeting. Then it is said that article 9 has some bearing. Article 9 does not deal with issuing new shares at all, and cannot be said to override article 59, which is perfectly clear and leaves "issue" with the general meeting by resolution. The result is that I agree with the conclusions come to by my brethren, and that there should be an injunction.

Solicitors for appellant: *Cohen & Cohen.*
Solicitors for respondents: *Ingle, Holmes, Sons & Pott.*

G. A. S.

NEVILLE J.

1910

Oct. 27;
Nov. 1.

In re COASTERS, LIMITED.

[No. 0048 of 1909.]

Company—Winding-up—Contributory — Certificate that Shares were fully paid—Estoppel—Allotment to Partnership—Partner one of Directors who signed Certificate—Notice.

C. K. & Co., a partnership firm, agreed to sell a ship to a company for 1500*l.* and to take 1000*l.* in fully-paid shares. The transaction was carried out by the firm mortgaging the ship for 1000*l.*, paying the money to the company, and then transferring the ship to the company subject to the mortgage at the price of 500*l.* The 1000*l.* was paid before any shares had been allotted. E., who was a promoter of the company, applied the money, without the knowledge or authority of the firm, in paying 5*s.* per share payable on application on 4000 shares for which he had applied. These shares, numbered 791 to 4790, were allotted to him and entered in the register with only 5*s.* paid. Subsequently K., one of the partners, became a director of the company; 1000 of E.'s shares were transferred to the firm. A certificate was issued by the company to the firm that these shares, numbered 891 to 1890, were fully paid. The certificate was signed by two directors, of whom K. was one. The company was being wound up compulsorily, and the liquidator put the firm on the list of contributories for 15*s.* on each of 1000 shares:—

Held, that K. had no actual knowledge of the transaction and had not acted in collusion with E.; and in that state of his knowledge the fact that he was a director and signed the certificate did not affect either him or his firm with notice of the facts or prevent them from relying on the estoppel created against the company by the certificate.

THIS was a summons taken out in the matter of Coasters, Limited, a company in liquidation, by James Clements and George Knowling, trading in partnership as Clements, Knowling & Co., that the list of contributories might be varied by striking out the name of the firm.

The company was incorporated on November 11, 1907, with a capital of 35,000*l.* in 1*l.* shares to carry on business as shipowners and contractors. On the same day a prospectus was issued asking subscriptions for shares and fixing the minimum subscription on which the directors would proceed to allotment at 5500 shares.

Shortly after its incorporation the company, through Savill, one of its promoters, entered into negotiations with the firm for the purchase of a small sailing ship. It was at first agreed

that the company should purchase for 1500*l.* and the firm should take payment of 1000*l.* in fully-paid shares. Savill then proposed as a modification that Clements and Knowling should mortgage the ship for 1000*l.* and pay the money to the company for 1000 fully-paid shares, and then sell the ship, subject to the mortgage, to the company for 500*l.* This was carried out on December 9, 1907, by the firm's executing a mortgage of the ship to Constant. They received his cheque for 1000*l.* and indorsed it to the company in payment, as they intended, for 1000 shares. It did not appear that any formal application for shares was made in the name of the firm. The money was, without the knowledge or consent of Knowling or his firm, credited by the company in their account with Ellis, a promoter, in payment of 5*s.* per share payable on application on 4000 shares which had been applied for by Ellis in order to make up the number of applications necessary for allotment.

At a meeting of the directors on December 10, 1907, 4000 shares, numbered 791 to 4790 inclusive, were allotted to Ellis and entered in his name on the register as shares on which only the application money had been paid. At the same meeting the purchase of the ship for 500*l.* subject to the mortgage was formally resolved on. The statutory meeting of the company was held on February 6, 1908, and Knowling was then elected a director. He first attended a meeting of the board on March 30, and was present at all the subsequent meetings.

At a meeting on June 12, 1908, certificates were issued to the firm stating that "Messrs. Clements, Knowling & Co. is the registered proprietor of one thousand fully-paid ordinary shares of 1*l.* each numbered 891 to 1890 inclusive in the above company." A similar certificate was on the same day issued to Ellis stating that he was the proprietor of 4000 fully-paid shares, numbered 791 to 4790. In the same month of June a transfer was executed by Ellis to Clements, Knowling & Co., for a nominal consideration, of 1000 shares numbered 891 to 1890. This transfer was not dated, but the stamp was dated June 18. Both the certificates issued on June 12 were signed by Knowling and Savill as directors.

Ten shillings per share was payable on allotment, and a final

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call of 5*s.* a share was made on June 17, but no demand was ever made on the firm for any payment in respect of these further calls.

Knowling stated that he executed the transfer on being told that the 1000 shares applied for by his firm had been included in the allotment to Ellis because no formal application had been made by the firm.

The company was ordered to be wound up compulsorily on February 17, 1909, and the official liquidator entered the firm of Clements, Knowling & Co. in the list of contributories for 1000 shares with only 5*s.* paid per share.

L. W. Byrne, for the applicants. The applicants contend that the 1000 shares issued to Clements and Knowling's firm were in fact paid up, and that if they were not fully paid the partners were induced by fraud to take shares which were not paid up, and the company are estopped by their certificate that the shares are fully paid from alleging they are not. The application of the doctrine of estoppel to the issue by a company of certificates that shares are fully paid is clearly established. *Parbury's Case* (1); *Burkinshaw* v. *Nicolls* (2); *Bloomenthal* v. *Ford*. (3) The only question is whether the allottees of the shares had such notice as prevents them from relying on the estoppel. It must be observed that in this case the allottee was the partnership firm, and it does not follow that they had the same notice as Knowling had. But Knowling himself had no such notice as would prevent his relying on the estoppel. A director is not by virtue of his office fixed with notice of everything which appears in the books of the company: see *Hallmark's Case* (4) and *In re Denham & Co.* (5), where Chitty J. cites *Hallmark's Case* (4) with approval.

Fischer Williams, for the liquidator. The case is perfectly simple. Certain shares fully identified by numbers in the register are entered as having 5*s.* only paid up, and that not by the partnership, but by Ellis. Anything which may have happened between

(1) [1896] 1 Ch. 100.
(2) (1878) 3 App. Cas. 1004.
(3) [1897] A. C. 156.
(4) (1878) 9 Ch. D. 329, 332.
(5) (1883) 25 Ch. D. 752.

Savill and the company or Savill and Ellis cannot affect the question. Then Knowling joined the board. He must be taken to have known something about the position of affairs, and he signed the certificates of these same shares as fully paid. The only ground on which the partnership firm can escape liability must be that of estoppel by the certificate, but a man cannot possibly raise an estoppel in his own favour. In the cases cited where it was attempted to fix the directors with notice of what appeared in the books of the company they had not signed anything. In *Dixon* v. *Kennaway & Co.* (1), where it was attempted to make a director responsible for the issue of a certificate he had not signed, Farwell J. lays special stress on the fact that he had not signed and implies that he would have been affected with notice if he had signed. In *Ex parte Daniell* (2) Daniell was found liable for shares which he had taken under a resolution of the board making them fully paid because he was a director. To be effective notice need only be such as would put a man on inquiry: see s. 3 of the Conveyancing Act, 1881, and Lord Halsbury's judgment in *Bloomenthal* v. *Ford.* (3) In this case if Knowling had made any inquiry whatever, as it was his duty to do, he would have had notice.

No distinction can be drawn between Knowling and his firm. It is impossible to sue one of two joint holders of shares. Notice to a partner is notice to his firm under s. 16 of the Partnership Act, 1890. It is impossible for a partnership to set up ignorance in its character of principal when there is notice to a partner as agent.

Neville J. The only question in this case is whether in favour of the applicants' firm of Clements, Knowling & Co. the certificate that certain shares were fully paid up creates an estoppel against the company and the liquidator, or whether the firm are bound by the actual facts. It appears on the evidence that as between the firm and the company the transaction was in good faith. The company desired to purchase a ship which was the property of the firm. The original proposition was that

(1) [1900] 1 Ch. 833. (2) (1857) 1 De G. & J. 372.
(3) [1897] A. C. 160.

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the company should purchase for 1500*l.* and the firm should accept 1000*l.* in fully-paid shares. There was a modification of that arrangement. The firm mortgaged the ship for 1000*l.*, paid over the 1000*l.* to the company as payment in full for 1000 fully-paid shares, and then transferred the ship, subject to the mortgage, to the company for 500*l.* So far upon receipt by the firm of a certificate for fully-paid shares no question could possibly arise. But what actually happened was this. It appears from the books of the company that Ellis, who was a promoter of the company, having got hold of the cheque for 1000*l.*, paid it into the banking account of the company, and it also appears from the same books that this sum was entered as paid not, as it ought to have been, on account of shares to be allotted to the firm, but as the application money on 4000 shares applied for by Ellis himself. The firm had no knowledge of this application of the cheque and had not given the slightest authority for any such application. After this Knowling was appointed a director of the company, and on June 12, 1908, the certificate for 1000 fully-paid shares was issued to the firm, and Knowling was one of the two directors who signed it. The question I have to decide is whether this signature by Knowling necessarily prevents the certificate from protecting his firm by acting as an estoppel. I think the knowledge possessed by Knowling at this time is quite clear. He knew that the cheque for 1000*l.* had been paid by his firm and that his firm was to receive in exchange for it 1000 fully-paid shares. That was all that he knew, and that transaction on the face of it was a perfectly legitimate transaction. If he had investigated the matter further, he would have found that the numbers of the shares allotted to his firm coincided with the numbers of some of those allotted to Ellis. Was Knowling thereby affected with constructive notice, in the absence of actual knowledge, of the facts which appeared in the books of the company? In my opinion he was not. He was entitled, in my opinion, to believe that the transaction was an issue to his firm of fully-paid shares in return for money which they had actually paid.

It was contended that the doctrine of estoppel cannot apply to this case at all, because one of the members of the partnership

was also one of the directors who signed the certificate which created the estoppel. In my opinion that fact does not, by itself, prevent an estoppel arising having regard to the facts already stated. It does not seem to me that this fact alone can be relied on to prevent an estoppel arising when the actual knowledge of Knowling as to the real state of the facts was only what I have stated. The only ground, in my opinion, on which estoppel would be defeated in this case would be that Knowling had acted in collusion with Ellis.

It is impossible for me to hold on the evidence, as Knowling was not cross-examined on the point, that there was any collusion on his part. The case must be treated as an honest transaction in which the firm paid 1000 good pounds sterling for 1000 shares.

The only other point to be considered is that the firm took a transfer from Ellis of the shares in question. It is argued that that fact prevents any estoppel, but I do not think that it really affects the transaction at all. The statement by the company that the shares were fully paid remains. The firm became shareholders in respect of shares which the company certified to be fully paid, and the estoppel is clear notwithstanding the transfer. As soon as we find the fact certified that the shares numbered 891 to 1890 are fully paid we may disregard the transfer. Knowling may well have thought that the shares were issued to Ellis by mistake. The application succeeds, the name of the firm must be removed from the list, and the costs must be paid out of the assets.

Solicitors: *Goddard & Co.; Adams & Adams.*

J. R. B.

C. A.
1910
Oct. 26;
Nov. 9.

In re THE SPANISH PROSPECTING COMPANY, LIMITED.

[No. 80315 of 1909.]

Company—Contract of Service—Cumulative Salary payable out of "Profits"—Winding-up—Payment of Creditors and Shareholders in full—Surplus in Hands of Liquidator—Undrawn Profits—Arrears of Salary.

P. and V. agreed to serve a company at a fixed salary which they were not to be entitled to draw "except only out of profits (if any) arising from the business of the company which may from time to time be available for such purpose, but such salary shall nevertheless be cumulative, and accordingly any arrears thereof shall be payable out of any succeeding profits as aforesaid." The business of the company included the purchase and sale of shares. In the course of and for the purposes of its business the company acquired shares and debentures in another company. The shares were sold for cash and the proceeds brought into profit and loss account. The debentures were included in the yearly balance-sheets of the company as an unvalued asset. In the voluntary liquidation of the company the whole of the assets were sold, the debentures realizing 3072*l.*; all the creditors, except P. and V., to whom about 8000*l.* in respect of arrears of salary was due, were paid in full, and all the subscribed capital was returned to the shareholders, leaving a surplus of 3328*l.* in the hands of the liquidator:—

Held, reversing the decision of Swinfen Eady J., that the surplus in the hands of the liquidator ought to be treated as undrawn profits arising from the business of the company out of which P. and V. were entitled to be paid.

The meaning of the word "profits" explained by Fletcher Moulton L.J.

Frames v. *Bultfontein Mining Co.*, [1891] 1 Ch. 140, and *Rishton* v. *Grissell*, (1868) L. R. 5 Eq. 326, distinguished.

This was an appeal from a decision of Swinfen Eady J.

The Spanish Prospecting Company, Limited, was incorporated in 1901 for the objects mentioned in its memorandum of association, which included, inter alia, the acquisition, development, and turning to account of mines and mineral interests in Spain.

By an agreement dated June 4, 1901, and made between W. C. Punchard, J. M. Fleming, and S. Vivian as vendors, and the company as purchaser, it was agreed that the vendor should sell and the company should purchase the benefit of certain options in mining properties in Spain. It was further agreed

that the vendors should during the continuance of the agreement give to the company the first refusal of all mining properties or rights in Spain which might be offered to them on sale, lease, or option. During the continuance of the agreement the vendors were to act as technical advisers to the company in connection with the acquisition, development, or turning to account of any properties or rights in Spain which it might be interested in or desire to acquire. Clause 5 of the agreement was as follows: "In consideration of the premises the company shall during the continuance of the agreement pay to each of the vendors a salary at the rate of 41*l.* 13*s.* 4*d.* per month commencing from February 15, 1901, provided nevertheless that the said W. C. Punchard and S. Vivian shall not be entitled to draw their said salary except only out of profits (if any) arising from the business of the company which may from time to time be available for such purpose, but such salary shall nevertheless be cumulative, and accordingly any arrears thereof shall be payable out of any succeeding profits available as aforesaid." The agreement was to determine ipso facto on the winding-up of the company.

In the course of its business, in June, 1901, the company acquired through the vendors 6000 shares in a company called the Spanish Minerals Development, Limited. Of these shares the company resold 1200 to Messrs. Punchard and Vivian and held 4800 until 1906, when the Spanish Minerals Development, Limited, disposed of the bulk of its property for a large sum payable in cash, shares, and debentures in the Esperanza Copper and Sulphur Company, Limited. The company received for its 4800 Spanish Minerals shares 4040*l.* in cash, 3360 fully-paid shares of 1*l.* each, and 3840*l.* in debentures of the Esperanza Copper and Sulphur Company, Limited. The company afterwards sold the 3360 shares in the Esperanza Company for 4236*l.*, which sum together with the 4040*l.* cash was duly credited in the profit and loss accounts of the company, but the Esperanza debentures were not so credited.

The profit and loss account of the company for the year ended September 30, 1908, shewed a debit balance of 270*l.* 4*s.* 5*d.* On the credit side of the account appeared a sum of 182*l.* 8*s.* in respect of interest on the Esperanza debentures, but no value

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was placed upon the debentures in the balance-sheet for the same period. In this balance-sheet there was a note to the effect that there was an amount of 7621*l.* 13*s.* 9*d.* due in respect of Messrs. Punchard and Vivian's remuneration under the agreement of June 4, 1901, which sum was only payable out of profits. In previous balance-sheets a note had appeared that there would be a further credit when the Esperanza debentures were realized, but this note was omitted, it was said by a slip, from the balance-sheet for 1908.

At the ordinary general meeting of the company held on December 21, 1908, the directors submitted the accounts above referred to and reported that the interests of the shareholders would best be served by winding up the company and distributing its assets. The report stated that the 3840*l.* debentures in the Esperanza Company were still in the hands of the company.

The company was afterwards wound up voluntarily, and in the realization of the assets by the liquidator the Esperanza debentures were sold for the sum of 3072*l.* The paid-up capital was returned to the shareholders in full, and after all the debts, except the claim of Messrs. Punchard and Vivian, had been satisfied there remained in the hands of the liquidator the sum of 3328*l.* 7*s.* 8*d.*, which was claimed by Messrs. Punchard and Vivian as accumulated profits arising from the business of the company and as such applicable to the payment of the arrears of salary due to them under the agreement of June 4, 1901. The liquidator being prepared to admit their claim, an originating summons was taken out by two contributories asking for a declaration that the applicants were not entitled to prove in respect thereof.

Upon the hearing of the summons Swinfen Eady J. held that at the date of the commencement of the winding-up the debentures formed part of the assets of the company, there being a debit balance of 270*l.* on profit and loss. There was therefore no profit arising in the carrying on of the business of the company, which came to an end with the winding-up. The 3328*l.* in the hands of the liquidator represented the surplus of realized assets over and above the subscribed capital, but it was not, within the

authorities, a profit arising from the business of the company, because it was obtained on the ultimate realization of the whole of the property and assets of the company. Under the agreement the claimants had no right to payment of their salary out of surplus assets on the winding up of the company.

From this decision the claimants appealed.

Gore-Browne, K.C., and *Clauson*, for the appellants. The appellants have a contractual right to payment out of the sum in the hands of the liquidator which represents profits arising from the business of the company within the meaning of the agreement. When a partnership concern has to be wound up all debts must be paid, and when each partner has been repaid what he has brought in as capital, then any balance that is left is "profit": *Bishop* v. *Smyrna and Cassaba Ry. Co.* (1) That applies here. The Esperanza debentures might have been realized before the winding-up and the proceeds distributed as profit. The proceeds of sale are none the less "profits" by reason of their having been realized in the winding-up.

Hon. Frank Russell, K.C., and *A. Sims*, for the respondents. This is a service agreement, and "profits" in such an agreement must be restricted to profits realized by the company as a going concern. This item was deliberately omitted from the balance-sheet of 1908.

[Fletcher Moulton L.J. Surely these are profits earned or acquired during the life of the company.]

They are not profits arising from the business of the company as a going concern: Buckley on the Companies Acts, 9th ed. p. 652.

Profits realized on a sale in a winding-up are not "profits" within this agreement: *Rishton* v. *Grissell* (2); *Frames* v. *Bultfontein Mining Co.* (3); *In re Espuela Land and Cattle Co.* (4) The business of a company is at an end when a winding-up takes place: *Bisgood* v. *Henderson's Transvaal Estates, Ld.* (5) The surplus in the hands of the liquidator is not "profits" arising from the business of the company: *Birch* v. *Cropper*. (6)

(1) [1895] 2 Ch. 265.
(2) L. R. 5 Eq. 326.
(3) [1891] 1 Ch. 140.
(4) [1909] 2 Ch. 187.
(5) [1908] 1 Ch. 743.
(6) (1889) 14 App. Cas. 525.

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Clauson in reply. In *Frames* v. *Bultfontein Mining Co.* (1) the business was sold as a whole, goodwill and all. Neither that case nor *Rishton* v. *Grissell* (2) has any application to this case. The business of the company here resulted in a profit which was kept in specie until the winding-up and realized subsequently. The debentures were properly indicated in the company's balance-sheets though no value was placed upon them. The rights of a creditor are not affected by what the directors may do with reference to the domestic documents of the company.

A. E. Hughes, for the liquidator.

Cur. adv. vult.

Nov. 9. COZENS-HARDY M.R. This appeal turns upon the meaning of the word "profits." The company is in voluntary liquidation. The creditors, except Messrs. Punchard and Vivian, have been paid in full, and all the subscribed capital has been returned, and there is a surplus of upwards of 3000*l.* in the hands of the liquidator, and this sum, less costs, is claimed by Punchard and Vivian under the following circumstances.

By an agreement dated June 4, 1901, Punchard and Vivian were, for the valuable consideration therein mentioned, to receive a salary at the rate of 41*l.* 13*s.* 4*d.* per week each, subject to a proviso that they should not be entitled to draw their salary "except only out of profits (if any) arising from the business of the company which may from time to time be available for such purpose, but such salary shall nevertheless be cumulative, and accordingly any arrears thereof shall be payable out of any succeeding profits as aforesaid." The business of the company included the purchase and sale of shares. In 1901 the company purchased 6000 fully-paid shares of 1*l.* each in the Spanish Minerals Development, Limited, the consideration being the allotment of 6000 fully-paid shares of 1*l.* each in the Prospecting Company. Twelve hundred of the Development Company's shares were sold, leaving 4800 in the company's hands. The Development Company was wound up, and the Prospecting Company received in respect of their holding (*a*) 3840*l.* in cash, (*b*) 3840*l.* debentures of the Esperanza Company, and (*c*) 3360

(1) [1891] 1 Ch. 140. (2) L. R. 5 Eq. 326.

shares in the Esperanza Company. In the balance-sheet for 1906 the cash was subtracted from the 4800*l.* and the shares were put as an asset at the figure of 960*l.* A note was added that the company had also received items (*b*) and (*e*), but no value was attributed to them in the balance-sheet; and that a further small cash payment would be forthcoming. In 1907 the shares —item (*c*)—were sold, and the proceeds were carried to the credit of the profit and loss account, and it was stated that there would be a further credit when the debentures—item (*b*)—were realized. In 1908 the report of the directors stated that the debentures were still in the hands of the company, and that it was proposed to wind up the company. The debentures were sold by the liquidator shortly after his appointment. There was no goodwill and no fixed capital. The assets consisted solely of cash and loans and shares and these debentures. Swinfen Eady J. has held that at the commencement of the winding-up the debentures formed part of the assets of the company, but that there was still a debit balance on profit and loss account, and that the company's business came to an end with the winding-up, and that the claimants are not entitled to be paid.

With great respect to Swinfen Eady J., I am unable to agree with this conclusion. The proceeds of the 6000 shares from time to time realized by the company were properly entered in the accounts and placed to the credit of profit and loss. This appears from the accounts for 1907. The balance-sheet for the same year recognizes that the company held the debentures which had at present no market quotation, and the directors did not put any estimate of value upon them. The liquidator has, however, realized these debentures, and I can see no reason why the proceeds should not be placed to the credit of profit and loss. The realization of this asset was not new business carried on by the liquidator. If goods are sold and bills given by the purchaser which have not matured at the commencement of the winding-up, the liquidator can collect the bills or discount them without embarking on new business. The language of Lindley L.J. in *In re Bridgewater Navigation Co.* (1) seems to me to be a clear authority in support of this view. He

(1) [1891] 2 Ch. 317.

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points out that although while the company was carrying on business debts owing to it were underestimated, this was done from motives of prudence, but that when the actual value was known the difference between the estimated and ascertained value really represented undrawn profits. In the present case no estimate was put upon the debentures, and the result is that the entire proceeds realized by the liquidator should be treated as undrawn profits arising from the company's business out of which the claimants are entitled to be paid. It follows that in my opinion the appeal should be allowed and the claimants should be declared entitled to the balance in the hands of the liquidator subject to the costs of the liquidation, including the liquidator's remuneration, and the costs of this summons here and below.

FLETCHER MOULTON L.J. The question for our decision in the present case is of some general interest because it turns upon the legal meaning of the word " profits," and inasmuch as I believe that the decision of the learned judge in the Court below is erroneous and that uncertainty or error in so fundamental a matter may lead to serious confusion, I shall in the first place consider the general question and then proceed to deal with the special facts of the case.

The word " profits " has in my opinion a well-defined legal meaning, and this meaning coincides with the fundamental conception of profits in general parlance, although in mercantile phraseology the word may at times bear meanings indicated by the special context which deviate in some respects from this fundamental signification. " Profits " implies a comparison between the state of a business at two specific dates usually separated by an interval of a year. The fundamental meaning is the amount of gain made by the business during the year. This can only be ascertained by a comparison of the assets of the business at the two dates.

For practical purposes these assets in calculating profits must be valued and not merely enumerated. An enumeration might be of little value. Even if the assets were identical at the two periods it would by no means follow that there had been neither

gain nor loss, because the market value—the value in exchange—of these assets might have altered greatly in the meanwhile. A stock of fashionable goods is worth much more than the same stock when the fashion has changed. And to a less degree but no less certainly the same considerations must apply to buildings, plant, and other fixed assets used in the business, because one form of business risk against which business gains must protect the trader is the varying value of the fixed assets used in the business. A depreciation in value, whether from physical or commercial causes, which affects their realizable value is in truth a business loss.

We start therefore with this fundamental definition of profits, namely, if the total assets of the business at the two dates be compared, the increase which they shew at the later date as compared with the earlier date (due allowance of course being made for any capital introduced into or taken out of the business in the meanwhile) represents in strictness the profits of the business during the period in question.

But the periodical ascertainment of profits in a business is an operation of such practical importance as to be essential to the safe conduct of the business itself. To follow out the strict consequences of the legal conception in making out the accounts of the year would often be very difficult in practice. Hence the strict meaning of the word "profits" is rarely observed in drawing up the accounts of firms or companies. These are domestic documents designed for the practical guidance of those interested, and so long as the principle on which they are drawn up is clear their value is diminished little if at all by certain departures from this strict definition which lessen greatly the difficulty of making them out. Hence certain assumptions have become so customary in drawing up balance-sheets and profit and loss accounts that it may almost be said to require special circumstances to induce parties to depart from them. For instance, it is usual to exclude gains and losses arising from causes not directly connected with the business of the company, such, for instance, as a rise in the market value of land occupied by the company. The value assigned to trade buildings and plant is usually fixed according to an arbitrary rule by which they are

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originally taken at their actual cost and are assumed to have depreciated by a certain percentage each year, though it cannot be pretended that any such calculation necessarily gives their true value either in use or in exchange. These, however, are merely variations of practice by individuals. They rest on no settled principle. They mainly arise from the sound business view that it is better to underrate than to overrate your profits, since it is impossible for you to foresee all the risks to which a business may in future be exposed. For instance, there are many sound business men who would feel bound to take account of the depreciation in value of business premises (or in the value of plant specially designed for the production of a particular article) although they would not take account of appreciation in the same arising from like causes.

To render the ascertainment of the profits of a business of practical use it is evident that the assets, of whatever nature they may be, must be represented by their money value. But as a rule these assets exist in the shape of things or rights and not in the shape of money. The debts owed to the company may be good, bad, or doubtful. The figure inserted to represent stock in trade must be arrived at by a valuation of the actual articles. Property, of whatever nature it be, acquired in the course of the business has a value varying with the condition of the market. It will be seen, therefore, that in almost every item of the account a question of valuation must come in. In the case of a company like that with which we have to deal in the present case this process of valuation is often exceedingly difficult, because the property to be valued may be such that there are no market quotations and no contemporaneous sales or purchases to afford a guide to its value. It is not to be wondered at, therefore, that in many cases companies that are managed in a conservative manner avoid the difficulty thus presented and content themselves by referring to assets of a speculative type without attempting to affix any specific value to them. But this does not in any way prevent the necessity of regarding them as forming a part of the assets of the company which must be included in the calculation by which de facto profits are arrived at. Profits may exist in kind as well as in cash. For instance, if a business is so far as assets and liabilities are

concerned in the same position that it was in the year before with the exception that it has contrived during the year to acquire some property, say mining rights, which it had not previously possessed, it follows that those mining rights represent the profits of the year, and this whether or not they are specifically valued in the annual accounts.

But though there is a wide field for variation of practice in these estimations of profit in the domestic documents of a firm or a company, this liberty ceases at once when the rights of third persons intervene. For instance, the revenue has a right to a certain percentage of the profits of a company by way of income tax. The actual profit and loss accounts of the company do not in any way bind the Crown in arriving at the tax to be paid. A company may wisely write off liberally under the head of depreciation, but they will be only allowed to deduct the sum representing actual depreciation for the purpose of calculating the profits for income tax. The same would be the case if a person had a right to receive a certain percentage of the profits made by the company. In the absence of special stipulations to the contrary, "profits" in cases where the rights of third parties come in mean actual profits, and they must be calculated as closely as possible in accordance with the fundamental conception or definition to which I have referred.

I would have it clearly understood that these remarks have no bearing upon the vexed question of the fund out of which dividends may legally be paid in limited companies. Cases such as *Verner* v. *General and Commercial Investment Trust* (1) and *Lee* v. *Neuchatel Asphalte Co.* (2) shew that this fund may in some cases be larger than what can rightly be regarded as profits, and the decisions in these cases depend largely upon the fact that there is no statutory enactment which forbids it to be so. In the present case, however, no question as to the limitations of this fund arises, so that I shall not make any further reference to these decisions or to the principles on which they rest, as they do not affect the matter before us.

We have now to apply these principles to the facts of the present case. The claim of the plaintiffs is under an agreement

(1) [1894] 2 Ch. 239. (2) (1889) 41 Ch. D. 1.

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with the Spanish Prospecting Company, Limited, whereby they were to act as technical advisers to the company in connection with the acquisition, development, or turning to account of any rights or properties in Spain which it might at any time during the continuance of the agreement be interested in or desire to acquire. The clause fixing their remuneration reads as follows: "In consideration of the premises the company shall during the continuance of this agreement pay to each of the vendors a salary at the rate of 41*l.* 13*s.* 4*d.* a month commencing from the 15th day of February, 1901. Provided nevertheless that the said William Charles Punchard and Stephen Vivian shall not be entitled to draw their said salary except only out of profits (if any) arising from the business of the company which may from time to time be available for such purpose, but such salary shall nevertheless be cumulative and accordingly any arrears thereof shall be payable out of any succeeding profits available as aforesaid."

The phrase "profits (if any) arising from the business of the company" gives rise to no difficulty. The memorandum of association was of the widest possible kind, and even if we reject the more general clauses it is evident that the acquisition, development, and turning to account of mineral interests in the kingdom of Spain was in a special sense a business which the company proposed to carry on. It is only to such business that the facts of this case relate.

During the existence of the company it acquired certain shares in a company called the Spanish Minerals Development, Limited. That company sold part of its property to the Esperanza Copper and Sulphur Company, Limited, and subsequently went into liquidation and distributed its assets partly in cash and partly in specie among its shareholders. Inasmuch as the Spanish Prospecting Company, Limited, was a holder of shares in this company at the date of its liquidation, it participated in this distribution of the assets in specie, and accordingly received 3360 shares and 3840*l.* debentures of the Esperanza Company. Nothing here turns on its possession of the shares which were subsequently sold by it at a substantial sum considerably above their face value. The amount so realized was brought into the accounts of the company in the ordinary

way. But the 3840*l.* debentures of that company were retained in specie and formed part of the assets of the Spanish Prospecting Company at the date when it went into voluntary liquidation. The liquidator realized its assets, and amongst them the debentures in question, and after repaying to the shareholders in full their capital and the interest due in respect of it there remained a surplus of 3328*l.* This sum had, no doubt, principally but not entirely arisen from the realization of the debentures in question. It is suggested that these securities were treated as valueless by the company at the date of the liquidation and that this has some legal effect on the status of the money obtained by their realization. I can see no grounds for such a suggestion in fact or law. The shares of the Esperanza Company, which necessarily ranked behind the debentures, had recently been sold for a substantial sum, and there is certainly nothing in the documents of the company which justifies the suggestion that the debentures were thought to be of no value. They were referred to as being in the hands of the company in the balance-sheets for 1906 and 1907 and in the report of the directors in 1908 which was sent to the shareholders with the accounts of that year, and it is plain that they were regarded as assets the value of which it was difficult to fix, but which had some value. I do not, however, propose to go more fully into this question because in my opinion it is immaterial. Whether of much or little value these debentures were unquestionably profits in kind made by the company in its business during the time it was carrying on that business, and when turned into money by realization the sum so realized stood in precisely the same position as the assets which it represented. It follows, therefore, that at the date of the liquidation the company had in its hands "profits" now represented by this sum of 3328*l.* No question arises as to the date at which such profits were earned, because the right of the appellants to payment is independent of any such question. But the respondents contend and have induced the learned judge in the Court below to decide that this sum is not "profits" because it was not in the form of money at the date of the liquidation but was turned into money during the realization. I am wholly incapable of appreciating this argument. It would apply to every asset of

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the company at the moment of liquidation except the cash in the till or safe. All the other assets exist in the form of land or chattels or rights which have to be realized before they can be treated as money and applied to the payment of liabilities to creditors or returned to the shareholders as capital or paid as profits to the persons entitled to them. What seemed to be mainly relied upon by counsel for the respondents in support of this view was that there would probably have been a difficulty in ascertaining the value of the debentures at the moment of liquidation. But there is nothing in the agreement which necessitates that any such value should be taken. The profits existed in the shape of the debentures; they did not cease to be profits because the company adopted the safer process of actual realization to the more hazardous one of acting on the then views of any person or persons as to the value of these debentures. It was also suggested that this value must have been very precarious because a suit was instituted on behalf of the debenture-holders to protect their interests, which were apparently in jeopardy through some act of the Esperanza Company itself. Even if such considerations were material, which in my opinion they are not, I can attach no weight to an argument which contends that a security must be valueless because its owners think it worth while to bring an action to protect it.

But the main argument on behalf of the respondents was based on certain decisions which are supposed to have established that if assets are realized by means of liquidation they can no longer be counted in the calculation of profits.

The two cases thus relied upon are *Frames* v. *Bultfontein Mining Co.* (1) and *Rishton* v. *Grissell.* (2) In the former case the directors of a company were entitled to be paid in each year as remuneration for their services a sum equal to 3 per cent. on the net profits of the company for such year. The business of the company was sold to another company for a very large sum, and the directors claimed to take that sum into account in calculating the profits of the year in which it occurred for the purpose of ascertaining their remuneration. Chitty J. held that they could not do so, and I cannot see how he could have come to any other

(1) [1891] 1 Ch. 140. (2) L. R. 5 Eq. 326.

conclusion. The sale included the goodwill of the business of the company, and therefore they were seeking to take the value of the goodwill of a company into account in ascertaining its profits. This is fundamentally wrong. The capital value of goodwill is an alternative to profits, not part of them. It is the price at which a person renounces his rights to future profits. Hence the goodwill of a business can never appear in the calculation of its profits. But Chitty J. realized that the company might have made profits during the time that it was carrying on its business although those profits could not be ascertained from the figures of the sale which subsequently took place, because it was impossible to sever the consideration and ascertain how much of the price was paid on account of assets and how much on account of goodwill. He therefore said that the plaintiffs might have an account of the net profits made by the company during the year. Such an account must of course have rested on a valuation of the assets acquired by the company and in its hands at the date of the liquidation and not on the sum actually realized by those assets, because there were, as I have said, no means of calculating what that sum was. The case of *Rishton* v. *Grissell* (1) so far as it has any application at all illustrates precisely the same point. Neither of these cases, therefore, gives in my opinion any support to the contention of the respondents.

I am therefore of opinion that the decision of the learned judge in the Court below was erroneous and that this appeal should be allowed.

FARWELL L.J. The appellants are creditors of the company for a sum of 8000*l.* or thereabouts for arrears of salary under the agreement of June 4, 1901, but are bound by the proviso in clause 5 not to claim payment thereof "except only out of profits (if any) arising from the business of the company which may from time to time be available for such purpose, but such salary shall nevertheless be cumulative, and accordingly any arrears thereof shall be payable out of any succeeding profits available as aforesaid." I think that the creditors were not during the existence of the company entitled to challenge any valuation or the

(1) L. R. 5 Eq. 326.

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amount of a reserve fund or the like fairly made; and accordingly that they cannot now impeach the omission of the Esperanza debentures from the balance-sheet of 1908 or their valuation at nil in that of 1907. This, however, does not alter the character of the monetary results of the company's business, or affect the rights of the creditors whose claim is cumulative and not confined to the profits of any one year: money which has in fact resulted from the profits made in trading is none the less profit because it is carried over to a suspense account or to a reserve fund: if it is lost in the trading of subsequent years, there is an end of it, but so long as it remains in statu quo it remains as undistributed profits: see Lindley L.J.'s judgment in *In re Bridgewater Navigation Co.* (1) The first question then is, are these Esperanza debentures profits arising from the business of the company? I am of opinion that they are. The business carried on by the company was that of speculators and dealers in mining properties, and these are amongst the objects included in their memorandum of association. The profits arising from the business of a company are not necessarily the same as the profits of that company. A company may have fixed capital as well as circulating capital (as I have endeavoured to explain in *Bond* v. *Barrow Hæmatite Steel Co.* (2)), and in that case the profits of its business would be those arising from the use of its circulating capital excluding its fixed capital. For instance, the profits arising from a draper's business would not include the increase over cost price of a freehold warehouse used in the business and afterwards sold. But in this case the company acquired in the course and for the purposes of its business certain shares and debentures in the Esperanza Company. The shares were sold in 1907, and the proceeds thereof duly and rightly brought into the profit and loss account of that year. The debentures appear in the same account, but have no value set against them and for the purposes of that account are treated as of no value, and in 1908 are mentioned in the directors' report as still in the hands of the company, but do not appear at all in the balance-sheet annexed to that report. Before any further report or balance-

(1) [1891] 2 Ch. 317. (2) [1902] 1 Ch. 353.

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sheet was issued the company went into voluntary liquidation, and the Esperanza debentures have been sold by the liquidator for 3072*l.* All the creditors of the company other than the appellants have been paid in full, the shareholders have received back all their share capital, and there remains a net balance of 3328*l.* 7*s.* 8*d.*, which the appellants claim as profits arising from the business of the company. Now it is not suggested that the company had anything that could be called fixed capital. The liquidator's account shews the realization of divers assets, and all are such as formed the general stock in trade with which the company dealt. The liquidator has simply wound up the business by realizing that stock in trade. The learned judge has decided against the appellants on two grounds—(1.) because the "profits" mentioned in clause 5 are confined to "profits" arising while the business of the company is being carried on. But assuming this to be so, it does not preclude the creditor from obtaining payment out of profits made but not realized during the continuance of the business. When a company is wound up its assets are applied in paying debts and liabilities irrespective of the nature and origin of such assets; but when all debts and liabilities have been paid and contributories have rights which depend on the nature and origin of the assets, it becomes necessary to analyze them and ascertain their origin. The question usually arises between preference and ordinary shareholders, but creditors with a claim against profits only are in at least as good a position as preference shareholders. (2.) The second ground on which the learned judge decided the case was that, on the authorities, the surplus of realized assets on winding up over and above the subscribed capital is not a profit arising from the business of the company. This, in my opinion, depends on the nature of the company's business and assets and cannot be predicated as universally true of all companies, and the authority of *Frames* v. *Bultfontein Mining Co.* (1), on which the learned judge relies, is really an authority against his decision. In that case the whole of the assets of the company were sold, including goodwill; the directors were entitled to 3 per cent. of the "net profits" of the company in each year. The company owned and

(1) [1891] 1 Ch. 140

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worked a diamond mine: the assets shewn on the balance-sheet included the value put on this mine (less a sum for depreciation) and diamonds sold and the like. The plaintiff was paid down to May 31, 1887. The company went into liquidation in April, 1888, and Chitty J., while rejecting the claim to any part of the profit made by the sale of the mine and goodwill, directed an inquiry as to the net profits made by the company down to May, 1888. He could not have directed such an inquiry if there was no right at all to any profits after winding-up. In the present case all the profits arise from the sale of part of the stock in trade after liquidation. There is no need for an inquiry because the amount is ascertained. I am of opinion that the judgment should be reversed.

Solicitors: *Slaughter & May; Pemberton, Cope, Gray & Co.*

G. A S

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In re ABRAHAMS.
ABRAHAMS *v.* BENDON.

[1909 A. 1652.]

Will—Infant—Contingent Legacy by Parent—Contingency not referable to Attainment of full Age—Interest—Maintenance—General Rule—Share of Residue.

The testator bequeathed to each son of his living at his death who should attain the age of twenty-five years the sum of 15,000*l.*, and a further sum of 15,000*l.* to each such son who should attain the age of thirty years. He directed his trustees to stand possessed of three fourteenth parts of his net residuary estate in trust for his son Frank in case and when he attained the age of twenty-one years, and provided that the said shares should not vest absolutely in him, but should be held in trust for him for life and after his death in trust for his children. Frank had only attained the age of thirteen years when his father died.

Upon a summons by the trustees to determine whether the legacies to Frank carried interest:—

Held that, inasmuch as the legacies were made contingent upon events having no reference to the infancy of the legatee, the case fell within the general rule that contingent legacies do not carry interest while in suspense, and did not fall within the exception to that rule giving to an infant the interest on a legacy from a parent or person in

loco parentis contingent upon the infant's attaining the age of twenty-one years or previous marriage; and that consequently neither of the legacies carried interest.

In re Moody, [1895] 1 Ch. 101, applied.

ADJOURNED SUMMONS.

By his will the testator bequeathed to each of his sons who should be living at his death and attain or have attained the age of twenty-four years the sum of 5000*l.* and a further sum of 10,000*l.* to each such son living at his death who should attain or have attained the age of thirty years. The testator devised and bequeathed his real and personal estate not thereinbefore disposed of to his trustees upon trust to convert and after payment of his funeral and testamentary expenses, debts, and legacies to stand possessed of the residue as to three fourteenth parts thereof for his son Harry, and as to other three fourteenth parts thereof for his son Frank in case and when he attained the age of twenty-one years; and the testator declared that the shares of his said sons in his residuary estate should not vest in them absolutely, but should be held by his trustees upon trust to pay the income to each such son during his life, and after his death upon trust for his children and issue as therein mentioned.

By a codicil the testator revoked the above-mentioned legacies of 5000*l.* and 10,000*l.* and bequeathed to each son of his who should be living at his death and should attain or should have attained the age of twenty-five years the sum of 15,000*l.*, and a further sum of 15,000*l.* to each such son living at his death who should attain or should have attained the age of thirty years.

The testator died on September 13, 1909, leaving two sons surviving him, namely, the defendant Harry Abrahams, who had attained the age of twenty-five years in February, 1909, and the defendant Frank Abrahams, who was then only thirteen years of age.

This was a summons by the executors and trustees (other than the defendant Harry Abrahams) for the determination (inter alia) of the question whether the legacies of 15,000*l.* and 15,000*l.* bequeathed to the defendant Frank Abrahams by the above-mentioned codicil on his attaining the ages of twenty-five and thirty years respectively carried interest, and, if so, at what rate,

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and from what date and during what period ought such interest to be calculated.

R. H. Hodge, for the trustees of the will.

W. F. Webster, for some of the residuary legatees. The general rule is that no interest is payable upon a contingent legacy. But in the case of a legacy by a parent to a child on attaining twenty-one, the Court will allow the income of the legacy by way of maintenance up to the age of twenty-one, but there is no case where maintenance has been given at a later age than that. Where, as here, the legacy is payable to the child on attaining twenty-five or thirty, the presumption of maintenance does not apply. Nor is interest payable where there is another fund provided by the will out of which maintenance for the infant can come. No interest is therefore payable upon the two legacies of 15,000*l.* to Frank Abrahams.

The question of interest on an infant's contingent legacy was fully considered by the Court of Appeal in the recent case of *In re Bowlby*. (1)

Levett, K.C., and *Cozens-Hardy*, for the elder son. The whole current of authority for years past is against the payment of interest upon a contingent legacy while it is in suspense. But an exception has been made by the Courts in the case of a legacy by a parent to an infant child payable at a future day. That carries interest where there is no provision made for the infant's maintenance in other parts of the will: *Harvey* v. *Harvey* (2); *Hearle* v. *Greenbank* (3); *Wynch* v. *Wynch* (4); *Ellis* v. *Ellis* (5); *Chambers* v. *Goldwin* (6); *Donovan* v. *Needham* (7); *In re Rouse's Estate* (8); *In re Cotton* (9); *May* v. *Potter* (10); *In re George*. (11) There is a presumption that the infant is entitled to the interest on the legacy as maintenance, and that may be rebutted by a provision for maintenance out of another fund.

(1) [1904] 2 Ch. 685.
(2) (1722) 2 P. Wms. 21.
(3) (1749) 3 Atk. 695, 716.
(4) (1788) 1 Cox, 433.
(5) (1802) 1 Sch. & Lef. 1.
(6) (1805) 11 Ves. 1.
(7) (1846) 9 Beav. 164.
(8) (1852) 9 Hare, 649.
(9) (1875) 1 Ch. D. 232.
(10) (1877) 25 W. R. 507.
(11) (1877) 5 Ch. D. 837.

The decision of Kekewich J. in *In re Moody* (1) is the other way, and it was there held that a legacy by a parent to a child carried interest by way of maintenance from the death of the testator, notwithstanding that the will provided for the maintenance of the child out of the income of the child's share of residue. It is submitted that this decision is wrong. It is no rule of law but only the presumption of the Court that gives an infant the income on the contingent legacy given by the parent, and consequently, if any other provision for the infant's maintenance is made by the will, the presumption will not arise. In this case other provision is made inasmuch as s. 43 of the Conveyancing and Law of Property Act, 1881, applies to the gift of residue, and thereby the presumption is rebutted even though there ultimately prove to be no residue.

We submit that in this case it cannot be presumed that the testator intended his son Frank to have the interest on either of these two sums at all before each became payable.

C. J. Mathew, for the infant defendant, Frank Abrahams. I submit that Frank is entitled to interest on the whole amount of each legacy while it is in suspense, and that at all events he is entitled to the interest on each until he attains the age of twenty-one years.

In all the earlier cases the word "maintenance" is used not in the statutory sense, but in the natural sense of the duty of a parent to make some provision for infant children; and the older decisions do not take the view that there was a right to maintenance, but they regard it as a right to interest.

In *Pett* v. *Fellows* (2) and *Beckford* v. *Tobin* (3) "interest" on the legacy was the word used, and in *Crickett* v. *Dolby* (4) "interest" as the "fruit of the legacy" was allowed. So also in the recent case of *In re Churchill* (5) Warrington J. calls it interest on the legacy.

In *Martin* v. *Martin* (6) the question was treated, wrongly as I submit, as a matter of maintenance only.

But now the question has come to be regarded no longer as a

(1) [1895] 1 Ch. 101.
(2) (1733) 1 Swans. 561, n.
(3) (1749) 1 Ves. Sen. 308.
(4) (1795) 3 Ves. 10.
(5) [1909] 2 Ch. 431.
(6) (1866) L. R. 1 Eq. 369.

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question of presumption, but as a question of construction: per Vaughan Williams L.J. in *In re Bowlby* (1); and so soon as an infant is entitled to a contingent legacy given by its father, then as a matter of construction it is entitled to the income necessary for its maintenance.

The decision in *In re Moody* (2) has now stood for fifteen years and has been cited before the Court of Appeal without adverse comment, and that shews that the applicability of s. 43 of the Conveyancing and Law of Property Act, 1881, to a share of residue given to an infant does not deprive the infant of the income of a contingent legacy. There must be some other express provision for the maintenance of the infant before as a matter of construction he will be deprived of his right to the income of the legacy. There are no reported cases where the contingency has been other than the attainment of twenty-one years or marriage under that age, but I submit that, the question being a matter of construction, the fact that the contingency in this case is the attainment of the age of twenty-five years as to one legacy, and thirty years as to the further legacy, makes no difference, and that both legacies carry interest at 4*l.* per cent., and that the surplus income must be treated as an accretion to the capital of the legacy, and does not go back to residue.

EVE J. The testator made his will on August 19, 1908. He added several codicils to it, the only one of importance being the first, dated December 11, 1908. He died on September 13, 1909. By his will he bequeathed to each of his sons who should be living at his death and attain or have attained the age of twenty-four years the sum of 5000*l.* and "a further sum of 10,000*l.* to each such son living at my death who attains or has attained the age of thirty years." Then he devised and bequeathed his residuary real and personal estate to trustees in trust for conversion and directed that they should stand possessed of three fourteenth parts of the net residue in trust for his son Harry, and a further three fourteenth parts in trust for his son Frank on his attaining the age of twenty-one years, and by subsequent provisions in his will he settled the shares of residue so bequeathed to his sons

(1) [1904] 2 Ch. 685, 695, 702. (2) [1895] 1 Ch. 101.

upon the usual trusts making them tenants for life with remainder to their children and issue. By the first codicil he revoked the legacies of 5000*l.* and 10,000*l.* bequeathed to each son and proceeded: "I bequeath to each son of mine who shall be living at my death and shall attain or shall have attained the age of twenty-five years the sum of 15,000*l.* and a further sum of 15,000*l.* to each such son living at my death who attains or shall have attained the age of thirty years." He left two sons surviving him, of whom one, Harry, for whom Mr. Levett appears, had attained twenty-five on February 13 preceding the testator's death. The other son, Frank, for whom Mr. Mathew appears, was born on September 16, 1896, and was, therefore, at the date of his father's death, and still is, an infant.

The questions raised for determination on this summons are whether the two legacies of 15,000*l.* bequeathed to Frank contingently on his attaining twenty-five and thirty carry interest, and, if either or both of them carry interest, from what date such interest runs, and during what period such interest is payable.

The general rule with regard to interest on contingent legacies is stated by James L.J. in *In re George* (1) in these terms: "The rule of law is well established that a contingent legacy does not carry interest while it is in suspense." To that rule there is an exception, and the exception is thus stated by the present Master of the Rolls in *In re Bowlby* (2): "A contingent legacy given by a father to an infant child is an exception to the rule that interest is not payable until the contingency happens, and in such a case interest is payable from the testator's death until the happening of the contingency." I may incidentally remark that so stated it would appear that the exception extends to every case where the legatee is an infant irrespective of the question whether the contingency is the attaining of the age of twenty-one or the happening of any other event.

In the present case, two grounds are urged on behalf of those who dispute the legatee's right to interest. In the first place it is contended that the exception only extends to cases where the contingency on which the legacy depends is the attainment of twenty-one, or, in the case of a female, marriage under that age;

(1) 5 Ch. D. 837, 843. (2) [1904] 2 Ch. 685, 712.

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and in the next place that the position of the legatee under this will brings him within the exception to the exception stated by James L.J. in *In re George* (1) in these terms: "the rule giving interest to the child does not take effect when the testator has provided another fund for his maintenance, so that the income of the legacy is supposed not to be required for the purpose."

With regard to that second point I consider myself bound by the decision of Kekewich J. in the case of *In re Moody*. (2) In that case the learned judge had to consider this very point whether the gift of a share of residue to an infant contingently on his attaining twenty-one, the income of which was by virtue of the provisions of s. 43 of the Conveyancing and Law of Property Act, 1881, available for the infant's maintenance, amounted to such a provision for his maintenance as to displace the application of the general rule applicable to legacies to infant children, and he determined that it did not, and accordingly that such a case does not come within the exception to the exception mentioned by James L.J. in *In re George*. (1) If I may be permitted to express an opinion of my own, I confess that I should not have come to the same conclusion, but seeing that this decision was given so long ago as 1894, that it has been cited in the Court of Appeal on more than one occasion, and that no case has been brought to my attention in which any judge has dissented from the view expressed by Kekewich J., I am bound to conclude that without the assistance of that case I should have decided the present case wrongly upon that point. Accordingly, I must hold that the gift of the share of residue in favour of the sons in this will, into which I have to read s. 43 of the Conveyancing and Law of Property Act, 1881, does not result in putting the sons in respect of their pecuniary legacies within the exception to the exception stated by James L.J. in *In re George*. (1)

It therefore remains for me to determine whether an infant legatee to whom the testator stands in loco parentis and whose legacy is contingent upon events having no relation to his infancy is within the exception itself. Now I agree with a great deal that has fallen from Mr. Mathew, who has argued

(1) 5 Ch. D. 837, 843. (2) [1895] 1 Ch. 101.

forcibly that at least during the continuance of infancy interest ought to be allowed. I agree that the matter is left somewhat in doubt as to whether maintenance is allowed and treated as interest on the legacy or whether interest is allowed and maintenance given thereout. But this much I think is clear from the historical examination of the cases through which Mr. Levett has taken us, that the exception had its origin in the desire of the Court to give effect to what the Court presumed must have been the intention of the testator, that is to say, to provide for the maintenance of the infant, an intention which might well be presumed in cases where the suspensory period was limited to the years when the infant would in the ordinary course require to be maintained, but which could not be presumed as readily, if indeed at all, where the legacy was made contingent upon events having no reference to the infancy of the legatee, and in this connection it certainly is remarkable that in all the cases to which my attention has been directed the contingencies have been the attainment by the child of full age or marriage under that age. There is no case in which I can see that the exception has been held to apply when the contingency is anything but the attainment of full age or marriage under that age.

In that state of things and bearing in mind that I am dealing with an exception engrafted on a general rule, ought I to be the first judge to hold that the exception extends so as to include contingencies of every description and having no relation to the attainment of full age? I do not think I ought to be. I think I ought to treat the exception as limited to those cases in which the contingency is the attaining of full age or previous marriage and to hold that, where the testator has made the legacy payable upon a contingency which has no reference whatever to the attainment of full age, the case ought to be treated as governed by the general rule and not as coming within the exception. Accordingly, upon what was really the first point taken by those who dispute the right of Frank to interest in this case I hold that neither of the legacies carries interest, and I think that must apply to the whole of the interest.

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It has been pressed upon me that at least until Frank attains twenty-one the legacies ought to carry interest, but I do not think the fact that he was under age when the testator died ought to be treated as sufficient to bring the case within the exception.

In my opinion the testator must be taken to have so framed the bequest as to keep the legacy outside the exception, and I think I should be creating confusion were I to treat the bequest as partly within and partly without the exception. The safer and more consistent course to take is to hold that it is altogether outside that class of case which is an exception to the general rule. Accordingly, I hold that in neither case is any interest payable upon the legacy to Frank.

Solicitors: *S. B. Cohen & Dunn.*

R. M.

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Nov. 24.

In re BEWICK.

RYLE *v.* RYLE.

[1910 B. 1624.]

Will—Devise of Real Estate—Trust to apply Net Rents in discharge of Mortgages and then sell—Gift of Proceeds to unascertained Class—Remoteness.

The testator devised all his real estate to his executors upon trust to receive the rents and, after paying thereout all rates, taxes, and outgoings and the cost of repairs, to pay off all mortgage charges existing on the real estate held by a certain named building society or others, and upon further trust when all the real estate should be clear of all charges to sell the same and divide the proceeds amongst all his children and issue then living in manner therein mentioned, and he gave and devised all the residue of his estate to his children equally.

The testator died in 1909, leaving children and grandchildren surviving him. His real estate, consisting entirely of house property, was subject to two mortgages to the building society, in the usual form of such mortgages, to secure 1000*l.* and 225*l.* respectively, payable by monthly instalments with interest. It appeared from the evidence that if the instalments were duly and regularly paid and the terms of the mortgage deeds complied with the larger mortgage would be completely discharged in 1927, and the smaller in 1921:—

Held, that the earlier devise of the real estate was void for remoteness, and that the real estate passed under the gift of residue.

In re Wood, [1894] 3 Ch. 381, applied.

ADJOURNED SUMMONS.

By his will, dated October 11, 1907, Luke Bewick, the testator, appointed his sons Richard Bewick and William Bewick his executors and trustees, and after certain specific bequests devised all his real estate to his trustees "Upon trust to receive the whole of the rents and income thereof and after paying all rates and taxes and outgoings thereon and keeping in repair the same to pay off all mortgage charges there may be existing on any of my said real estate held by the Blaydon Co-operative Society or others and upon further trust that as soon as all my said real estate shall be clear of all charges thereon then such real estate is to be sold by my trustees either privately or by public auction and the proceeds thereof equally divided amongst all my children then living and if any of my children shall be then dead leaving issue any of whom shall be then living such issue shall take (and equally amongst them if more than one) the share which their respective parents would have taken if then living."

The only remaining provision in the will was a devise and gift by the testator of all the residue of his estate to his children to be divided equally amongst them.

The testator died on July 8, 1909, and the executors named in the will having renounced probate, administration with the will annexed was granted to the plaintiff Mary Elizabeth Ryle.

The testator left six children surviving him, all of whom were plaintiffs, and several of them had children who were all still infants and some of whom were defendants.

At the testator's death his real estate, which consisted entirely of house property, was subject to two mortgages to the Blaydon Co-operative Society, both in the usual form of building society mortgages. One was dated March 18, 1907, and was to secure payment of 1000*l.* and interest by monthly instalments of 6*l.* 13*s.* 4*d.* payable on the 9th day of each month with interest at 5*l.* per cent. per annum, and the evidence shewed that if all instalments were punctually paid and the terms of the mortgage strictly complied with the mortgage debt would be fully

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discharged in or about 1927. The other mortgage, dated April 9, 1903, was to secure payment of 225*l.* and was in similar terms, and under the above conditions the debt would be fully discharged in or about 1921. Both mortgages contained the usual provisions imposing fines on breach of or non-compliance with the covenants and conditions on the part of the mortgagor therein contained.

The summons was taken out for (inter alia) a declaration that the trusts of the testator's real estate were void as infringing the rule against perpetuities, and that such real estate passed under the residuary devise contained in the will.

T. T. Methold, for the plaintiffs other than Richard Bewick. I submit that the trust for payment of the mortgage debts offends the rule against perpetuities, and that the gift to the class which cannot be ascertained until these debts are paid is therefore void.

H. T. Methold, for the plaintiff Richard Bewick.

J. H. Stamp, for the defendant grandchildren. These debts are of a peculiar character, and regard must be had to the state of things existing at the testator's death. The testator covenanted to pay them off within a period which was well within the rule against perpetuities. There is a definite obligation by the testator to pay them off within that period, and in this respect the present case is distinguishable from *In re Wood* (1), for in that case there was no covenant or obligation to work out the gravel pits within the six years. The administratrix intends to fulfil that obligation in due course.

[EVE J. Lindley L.J. in his judgment in *In re Wood* (2) approves the statement in Theobald on Wills that "possible and not actual events are to be considered, and, therefore, if at the testator's death a gift might possibly not have vested within the proper time, it will not be good because, as a matter of fact, it did so vest." In the present case it is quite possible that the surplus rents may not be sufficient to discharge the mortgages within the period.]

There was no obligation to work at all in that case, and if there

(1) [1894] 3 Ch. 381. (2) [1894] 3 Ch. 385.

had been I submit that it would have had to be considered by the Court of Appeal. Here there is a definite obligation to pay off all the instalments by certain dates which fall within the period allowed by the rule against perpetuities, and I ask the Court to assume that the debts will be discharged within that period. I submit that the trust is not void and that the gift is good.

[*T. T. Method* referred to *In re Lord Stratheden and Campbell.* (1)]

EVE J. This summons raises a short point of construction, the question being whether the devise of the testator's real estate is void for remoteness. [His Lordship read the devise, and continued:—] On the face of it that is a devise which is clearly void for remoteness, but Mr. Stamp, on behalf of the testator's grandchildren, says, and says rightly, that in applying the rule against perpetuities regard must be had to the state of things existing at the testator's death. At that date there were two charges on the realty held by the building society, and by the terms of those charges the principal moneys and interest thereby secured were repayable by instalments which if duly paid would discharge both mortgages within the period of a life in being at the date of the testator's death and twenty-one years afterwards. It is urged that I ought to assume that the administratrix will discharge the obligation by which the testator was bound to pay those instalments regularly, and that on that assumption I ought to hold that the trust for sale must necessarily arise within the period prescribed by law.

I do not think I can so hold; the rents and income are to be applied primarily in payment of rates, taxes, and outgoings and in keeping the houses in repair, and only the surplus remaining after those payments have been made is to be applied in discharging the mortgages, and although it may well be that such surplus will suffice to pay all the instalments within the period, I am not at liberty to speculate about probabilities (see per Davey L.J. in *In re Wood* (2)), and unless I am satisfied that the mortgages must be paid off within the prescribed period I do not see how I can hold the gift to be good. I think it is

(1) [1894] 3 Ch. 265. (2) [1894] 3 Ch. 387.

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too remote, and the real estate therefore passes under the gift of residue.

Solicitors: *Brash Wheeler, Chambers & Hosken, for J. A. Williamson, Newcastle-on-Tyne.*

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Nov. 21.

In re SOUTHPORT AND LYTHAM TRAMROAD ACT, 1900.

Ex parte HESKETH.

Parliamentary Deposit—Tramway Company—Abandonment of Undertaking—Diminution in Value of Land—Compensation to Landowner—Collateral Obligation—Covenant to make Embankment—Breach not necessary Result of Abandonment of Undertaking.

A company was authorized by Act of Parliament to construct a tramroad, which would cross land belonging to the respondent, "with all necessary and proper embankments," &c. By s. 50 of the Act it was provided that the deposit made upon the application for the Act, in pursuance of the Standing Orders and the Parliamentary Deposits Act, 1846, should, in the event of the tramroad not being completed, be applicable to (inter alia) compensation "to landowners or other persons whose property has been interfered with or otherwise rendered less valuable by the commencement, construction or abandonment of the tramroad" authorized by the Act. The company, in pursuance of the terms of an agreement made by them with the respondent before the passing of the Act, subsequently thereto entered into an agreement with him by which the respondent agreed to convey certain lands to the company, and to grant to them by way of easement the right of constructing and maintaining upon certain marsh lands belonging to him "a solid embankment for the purpose of carrying the company's authorized tramroad across the marsh lands," and the company agreed to "construct and thereafter maintain the embankment for the purpose of carrying the tramroad across the marsh lands in manner aforesaid" as a solid embankment, and to form it so as to connect certain existing sea banks, and to be sufficient to prevent the ingress of the tidal waters of a river over land belonging to the respondent. This agreement was followed by a conveyance by which the before-mentioned easement was granted to the company and which contained a covenant by the company to execute and perform the works specified in the agreement. The proposed tramroad was never made, and the company obtained an Act by which it was provided that they should abandon the same, and provision was made for the appointment of a liquidator and the winding up of the company. In proceedings in the Chancery Division in the matter of

the application of the deposit fund the respondent claimed against that fund in respect of diminution of the value of his property by the abandonment of the company's undertaking, and the consequent non-construction of the embankment, which would have protected his above-mentioned land from liability to be overflowed by the tidal water, and Warrington J., being of opinion that the respondent was a landowner whose land had been rendered less valuable by the abandonment of the company's tramroad within the meaning of s. 50 of the Act, allowed him to claim against the fund. On appeal by the liquidator of the company :—

Held, reversing the decision of the learned judge, that the non-construction of an embankment in accordance with the covenant was not a necessary consequence of the abandonment of the company's undertaking, and, therefore, the respondent was not entitled to compensation out of the deposit fund as claimed by him.

The doctrine of *In re Ruthin and Cerrig-y-Druidion Railway Act*, (1886) 32 Ch. D. 438, applied.

APPEAL from an order made by Warrington J. as aftermentioned.

A company named the Southport District Tramroad Company was incorporated by an Act intituled the Southport District Tramroad Act, 1899, and thereby empowered to construct a tramroad in and near Southport. In the year 1900 the company were applying to Parliament for power to construct certain tramways in continuation of the tramway authorized by the Act of 1899; and, in contemplation of that application, they entered into an agreement on May 8, 1900, with the respondent, Sir Thomas George Fermor Hesketh of Rufford Hall in the county of Lancaster, who was the owner of certain of the lands over which one of the tramways included in the proposed application, described as tramroad No. 2, was to be carried.

This agreement, which was expressed to be made between the Southport District Tramroad Company and Sir Thomas George Fermor Hesketh of Rufford Hall in the county of Lancaster, Bart., thereinafter called "the owner," recited that the company were promoting a bill in Parliament for the purpose of extending their tramroads; and by article 1 thereof it was provided that "The company shall use their best endeavours to obtain by the said bill power to construct, and, in the event of their obtaining such power, will construct, and afterwards maintain a solid embankment for the purpose of carrying tramroad No. 2 in such bill

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mentioned across the marsh lands situate between the enclosed lands in the township of North Meols and the enclosed lands in the township of Hesketh-with-Becconsall, such solid embankment, so far as the foundations will reasonably permit, to be linable with and to be formed so as to connect the existing sea banks, and to be sufficient to prevent the ingress of the tidal waters. The company shall provide and maintain in such embankment a sufficient culvert with suitable stop valve as an outlet for the waters of Hundred End Gutter." Then followed provisions as to the dimensions and construction of the culvert. By article 2 of the agreement it was provided that "the company shall amend their bill by inserting therein, and shall use their best endeavours to obtain the sanction of Parliament to the following clauses for the protection of the owner and his trustees." Then followed five clauses, the first, second, third, and fourth of which it is not necessary to set out, and the fifth of which, so far as material, was as follows: "The company shall acquire an easement only for or in respect of the construction, repair, and maintenance of the tramroad and works proposed to be authorised in and over the Hesketh Sands" (1); and it was stated that, in consideration thereof, the owner thereby agreed to withdraw all opposition to the bill, provided that, if the company should fail to obtain the sanction of the Commons' committee to whom the bill was referred to the insertion in their Act of the clauses thereinbefore contained, the owner should be at liberty to petition against the bill in the House of Lords on any ground or grounds he might think proper.

By the Southport and Lytham Tramroad Act, 1900 (63 & 64 Vict. c. cclxxx.), which received the Royal assent on August 6, 1900, it was recited that the Southport District Tramroad Company, thereinafter called the company, were incorporated by the Southport District Tramroad Act, 1899, thereinafter called "the Act of 1899," and were by that Act empowered to construct a tramroad in and near to Southport in the county of Lancaster, that it would be of public and local advantage if the company were authorized to construct the tramroads, tramway, and bridge

(1) These were the lands on which the before-mentioned solid embankment was to be constructed.

in the Act described in continuation of the tramroad authorized by the Act of 1899, so as to make direct means of communication between Southport and Lytham across the estuary of the river Ribble, and that plans and sections shewing the lines and levels of the works authorized by the Act, and a book of reference containing the names of the owners and lessees, or reputed owners and lessees, and of the occupiers of the lands required, or which might be taken, for the purposes of the Act, had been duly deposited with the clerk of the peace. The Act incorporated the Lands Clauses Acts. By s. 4 of the Act the name of the company was changed to the "Southport and Lytham Tramroad Company." By s. 5 it was provided that "subject to the provisions of this Act, the company may make, form, lay down, work, use, and maintain, in the lines and according to the levels shewn on the deposited plans and sections, the tramroads, tramway, and bridge hereinafter described with all necessary and proper rails, plates, foundations, sleepers, embankments, dykes, bridges, piles, platforms, jetties, groynes, landing stages, sluices, gates . . . . stations, approaches, sidings, buildings, lifts, toll houses and gates, apparatus, machinery, appliances and works connected therewith. The tramroads, tramway, and bridge authorized by this Act are as follows:—Tramroad No. 2 (3 miles 5 furlongs and 4·20 chains in length), commencing in the township of North Meols at a point on the centre line of the authorized Southport District Tramroad and terminating in the township of Hesketh-with-Becconsall in the New Sea Cop." Then followed a description of other tramroads and works which the company were authorized by the Act to construct and execute. By s. 22 of the Act it was provided that "persons empowered by the Lands Clauses Acts to sell and convey or release lands may, (if they think fit) subject to the provisions of those Acts and of this Act, grant to the company any easement, right, or privilege (not being an easement right or privilege of water in which persons other than the grantors have an interest) required for the purposes of this Act in over or affecting any such lands." By s. 27, "The following provisions for the protection and benefit of Sir Thomas George Fermor Hesketh of Rufford Hall, Lancashire, Baronet," were to "apply and have

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effect, that is to say": Then followed the clauses provided for by the agreement of May 8, 1900, clause 5 being that "The company shall acquire an easement only for or in respect of the construction repair and maintenance of the tramroad and works authorised in and over the Hesketh Sands, ..." Sects. 49 and 50 of the Act contained provisions with regard to the deposits made pursuant to the Standing Orders of the Houses of Parliament and the Parliamentary Deposits Act, 1846, upon the applications for the company's Acts of 1899 and 1900. The provisions of s. 50, so far as material, were as follows: "If the company do not previously to the expiration of the period limited for the completion of the tramroads and tramway complete the same, and open them for the public conveyance of passengers, then and in every such case the deposit fund, or so much thereof as shall not have been paid to the depositors, shall be applicable, and, after due notice in the *London Gazette*, shall be applied towards compensating any landowners or other persons whose property has been interfered with or otherwise rendered less valuable by the commencement, construction, or abandonment of the tramroads and tramway or any portion thereof, or who have been subjected to injury or loss in consequence of the compulsory powers of taking property conferred upon the company by this Act and for which injury or loss no compensation or inadequate compensation has been made, and shall be distributed in satisfaction of such compensation as aforesaid in such manner and in such proportions as to the High Court may seem fit; and, if no such compensation is payable, or if a portion of the deposit fund has been found sufficient to satisfy all just claims in respect of such compensation, then the deposit fund, or such portion thereof as may not be required as aforesaid, shall, if a receiver has been appointed, or the company is insolvent and has been ordered to be wound up, or the undertaking has been abandoned, be paid or transferred to such receiver or to the liquidator or liquidators of the company or be applied in the discretion of the Court as part of the assets of the company for the benefit of the creditors thereof, and subject to such application shall be repaid to the depositors."

By an agreement made March 26, 1906, between the

respondent, Sir Thomas Hesketh, and the company, after reciting provisions of the before-mentioned Act of 1900, it was agreed as follows. By article 1 of the agreement the respondent agreed to sell and the company to purchase "for the purposes of the undertaking authorized by the Act of 1900 for the sum of 1200*l.*, first, all those pieces or parcels of land situate in the parish of Hesketh-with-Becconsall in the said county of Lancaster, and containing by admeasurement eight acres, seven poles and one yard or thereabouts, which said lands are described in the First Schedule hereto, and are delineated in the plan hereunto annexed, and thereon coloured red, secondly full free and exclusive right and liberty at all times hereafter for the company and their assigns to construct and maintain upon the lands and hereditaments described in the Second Schedule hereto, and coloured green on the said plan, a solid embankment (hereinafter referred to as 'the new embankment') for the purpose of carrying the company's authorized tramroad No. 2 across the marsh lands situate between the vendor's enclosed lands (of which the lands described in the said First Schedule hereto form part) and the boundary of the vendor's estate in the Hundred End Gutter, where the new embankment will join on to a similar embankment to be constructed by the company across the marsh lands forming part of the estate of the trustees of the will of the late Charles Scarisbrick, also the like right at all times hereafter to lay and maintain a double line of rails along the new embankment and to use the same as part of the company's said tramroad in accordance with the provisions of the Act of 1900."

By article 5 of this agreement it was provided that "The company shall construct and thereafter maintain the new embankment for the purpose of carrying tramroad No. 2 across the marsh lands of the vendor in manner aforesaid as a solid embankment. Such embankment shall be constructed in the line shewn on the said plan, and be formed so as to connect the existing sea banks, and be sufficient to prevent ingress of the tidal waters. The company shall provide and maintain in such embankment a sufficient culvert with suitable stop valve as an outlet for the waters of Hundred End Gutter." Then followed provisions as

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to dimensions and construction of the culvert as in the agreement of May 8, 1900.

By an indenture dated October 1, 1906, the pieces of land mentioned in the agreement of March 26, 1906, and an easement in the terms mentioned by that agreement were conveyed by the respondent and other necessary parties to the company in accordance with the agreement, and the company covenanted that they would "do, construct, execute, and maintain, observe and perform the several works matters and things specified and contained in" (among others) the fifth paragraph of the said agreement.

The tramroads, tramway, and other works authorized by the Acts of 1899 and 1900 were never constructed, and by an Act intituled the Southport and Lytham Tramroad (Abandonment) Act, 1909 (9 Edw. 7, c. xl.), it was provided that the company should abandon the construction of the tramroads, tramway, and works so authorized by the Acts of 1899 and 1900, and provisions were made for the appointment of a liquidator and for the winding up and dissolution of the company. By s. 13 of that Act provision was made for the application of the deposit funds in accordance with the provisions of s. 47 of the Act of 1899 and s. 50 of the Act of 1900. The company never in fact entered on or physically interfered with the lands belonging to the respondent.

Proceedings having been taken in the Chancery Division by depositors in the matter of the application of the deposit funds, an order was made for an inquiry by a Master, in pursuance of which order advertisements were published in the *London Gazette* and other newspapers, which (inter alia) called upon landowners or other persons whose property had been interfered with or otherwise rendered less valuable by the construction, commencement, or abandonment of the tramroads and tramways authorized by the Acts of 1899 and 1900, or who had been subjected to injury or loss in consequence of the compulsory powers of taking property conferred upon the company by their Acts, and for which injury or loss no compensation or inadequate compensation had been paid, to come in within a certain time and prove their claims at the chambers of Warrington J., and stated that in default of their doing so they would be excluded from any benefit out of the

fund. By his certificate the Master reported as the result of his inquiries (inter alia) that there were no landowners or other persons whose property had been interfered with or otherwise rendered less valuable by the commencement, construction, or abandonment of the before-mentioned tramroads and tramways, or who had been subjected to injury or loss in consequence of the compulsory powers of taking property conferred upon the company by their Acts. Upon the certificate of the Master, an order was made for the transfer of the residue of the Consols representing the fund, after payment of costs of the proceedings, to the liquidator of the company. The respondent, who had not had notice or become aware that any proceedings had been taken, or advertisements issued, in regard to the before-mentioned deposit funds, prior to the last-mentioned order, applied to Warrington J. for an order that he should be allowed, notwithstanding the certificate of the Master, to come in and claim against the deposit funds in respect of the diminution of the value of his property by the abandonment of the tramroad No. 2 by the company, and the consequent non-erection of the embankment which would have protected his marsh lands from the ingress of the tidal water. It was contended on behalf of the liquidator that such diminution of value, if any, of the respondent's property was not caused by the abandonment of the tramroad within the meaning of the Act. Warrington J. was of opinion that this contention was negatived by the decision in *In re Ruthin and Cerrig-y-Druidion Railway Act* (1), and that, assuming that there had been a diminution in value of the respondent's land as alleged, the respondent was a landowner whose property had been rendered less valuable by the abandonment of the company's undertaking, and he therefore made an order that the respondent should, notwithstanding the Master's certificate, be at liberty to make and establish his claim in respect of the alleged diminution in value of his land.

The liquidator appealed.

P. O. Lawrence, K.C., and *Sargant*, for the appellant. The question in this case is whether the respondent is entitled to

(1) 32 Ch. D. 438.

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claim against the deposit fund in respect of any damage which he may have sustained through non-performance of the company's covenant to make an embankment which would prevent his land from being overflowed by the tide. It has been held that, in order that a landowner may be entitled in a case like this to claim against the deposit fund under a provision such as that contained in s. 50 of the Act of 1900, it must be shewn that the non-performance of the work which the company had covenanted to perform was a necessary consequence of the abandonment of the undertaking: *In re Ruthin and Cerrig-y-Druidion Railway Act.* (1) That cannot be shewn here. The embankment which the company covenanted to make can be made, although there will not be a tramway running along the top of it. The covenant to make a solid embankment so as to prevent the tidal water from overflowing the respondent's lands was really something merely collateral to the undertaking, because the Act did not oblige the company to adopt such an embankment as the particular means by which the tramroad was to be carried across the interval between the sea banks. It would have been competent for the company to have constructed that part of the tramway on trestles, or by means of a bridge or a structure like an iron pier, so that the water could flow under it. The station in the case of *In re Ruthin and Cerrig-y-Druidion Railway Act* (1) was an essential part of the undertaking. There could not be a railway station without a railway. Cotton L.J. in his judgment in that case distinguishes between the station and a fence which might be erected whether there was a railway or not. In order that there may be a right to claim against the deposit fund the damage must have been caused by the breach of some statutory obligation. [They also cited *In re Potteries, Shrewsbury, and North Wales Ry. Co.* (2)]

Cave, K.C., and *Austen-Cartmell*, for the respondent. The solid embankment was an essential part of the undertaking contemplated by the Act of 1900. Sect. 5 empowered the company to make the tramway in the lines and according to the levels shewn on the deposited plans and sections with all necessary and proper (inter alia) "embankments." The

(1) 32 Ch. D. 438. (2) (1883) 25 Ch. D. 251.

agreements of May 8, 1900, and March 26, 1906, and the conveyance of October 1, 1906, all define the obligation of the company as being to make the embankment for the purpose of carrying the tramroad. The parties to those instruments never contemplated the making of the embankment apart from the tramroad undertaking. Practically it was impossible that the embankment should be made apart from the construction of the tramroad, and in point of fact the non-construction of the embankment is really the necessary consequence of the abandonment of the undertaking. There was a statutory power given to take an easement, and an easement was taken by the company, in order to construct an embankment, and, in consequence, there was a conveyance of such an easement for the construction of an embankment, for the purpose of carrying the tramway in a certain way and with certain appliances which were authorized by the company's Act. Then the company procured an Act by which not only they were allowed to abandon the undertaking, but it was provided that they should abandon the works authorized by their former Act. They are, therefore, no longer authorized and have no power to make the tramway or the embankment. The process of making the embankment would be part of the process of making the tramway. The fences referred to in *In re Ruthin and Cerrig-y-Druidion Railway Act* (1) were independent of the line. The embankment here is like the railway station in that case. It was really part of the tramway. The fence was merely for the protection of adjoining lands. The whole question here is on which side of the line the case falls, and whether the making of the embankment is a merely collateral matter or is part of the undertaking or the tramroad itself. The covenant here defines the manner in which the company will carry out the statutory undertaking; it is not a mere collateral covenant to make an embankment for the purpose of protecting the respondent's marsh lands. The test given by Cotton L.J. in *In re Ruthin and Cerrig-y-Druidion Railway Act* (2) is whether the abandonment of the undertaking has made performance of the covenant impossible. The company's statutory powers are at an end, and they are no longer authorized

(1) 32 Ch. D. 438. (2) 32 Ch. D. 442.

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to make the embankment. It is no answer to say that it is physically possible in the sense that an embankment could be constructed by them at the place in question, so as to prevent the ingress of the tidal water, by arrangement with the respondent and the Scarisbrick trustees.

P. O. Lawrence, K.C., in reply. The impossibility of performance alluded to by Cotton L.J. is physical impossibility of performance. He was dealing there with a covenant to erect a railway station, and pointing out that it was impossible that there should be a railway station as distinguished from a mere building without a railway. It is quite possible that there should be an embankment without a tramroad on the top of it.

BUCKLEY L.J. The question for decision in this case is whether Sir Thomas Hesketh is entitled to claim against the parliamentary deposit fund compensation in respect of a certain breach of covenant by the company. We have nothing to do with any question as to whether he is entitled to prove for damages against the assets of the company; the question is only whether he is entitled to claim against the deposit fund. The case arises in this way. In the year 1899 a company called the Southport District Tramroad Company was incorporated for the purpose of making a tramway in and near Southport. On May 8, 1900, in contemplation of an extension of their tram lines, they entered into an agreement with Sir Thomas Hesketh, the substance of which, so far as material for the present purpose, was as follows. By article 1 the company were to endeavour to obtain an Act giving them power to construct certain tramways, including tramroad No. 2, and, in the event of their obtaining power so to do, they agreed to construct and afterwards maintain for the purpose of carrying tramroad No. 2 a solid embankment as described—I do not read that description, because it appears again in a subsequent agreement, upon the words of which the case turns—so as to connect certain sea banks and thereby protect lands belonging to Sir Thomas Hesketh from the ingress of the tidal waters. Article 2 of this agreement provided that the company should amend their bill by inserting certain clauses numbered 1, 2, 3, 4, and 5. That

agreement having been executed, the company succeeded in obtaining the Act of 1900. By that Act the name of the company was altered to the "Southport and Lytham Tramroad Company." By s. 5 they were authorized to make and maintain certain tramroads, including tramroad No. 2, "with all necessary and proper" (among other things) "embankments, dykes, bridges," &c. By s. 19 they were empowered to take lands compulsorily. By s. 27 certain provisions were introduced for the protection of Sir Thomas Hesketh, and the material observation upon the provisions of that section is that it reproduces in detail the clauses numbered 1, 2, 3, 4, and 5 in article 2 of the agreement of May 8, 1900, but does not reproduce article 1 of that agreement. In other words the Act does create towards Sir Thomas Hesketh a statutory obligation to perform clauses 1, 2, 3, 4, and 5, but does not create towards Sir Thomas Hesketh a statutory obligation to do what is mentioned in article 1. Sects. 49 and 50 of the Act, which are in common form, contain provisions as to the parliamentary deposits made by the promoters of the undertaking in respect of the Acts of 1889 and 1900, and in particular as to the application of those deposits in the event of (among other things) the authorized tramways not being completed. The question in this case arises on s. 50. I do not propose to read it, because it is in a form with which we are all familiar. Subsequently, on March 26, 1906, an agreement was made between Sir Thomas Hesketh and the company thus clothed with additional powers. By that agreement Sir Thomas Hesketh agreed to sell, and the company agreed to buy, certain lands coloured red on the plan annexed, being some part of the lands over which the embankment was to be carried, and Sir Thomas agreed to sell to the company, not the lands, but an easement over the lands, coloured green on the plan, which is described in these terms: "full free and exclusive right and liberty at all times hereafter for the company and their assigns to construct and maintain upon the lands and hereditaments described in the Second Schedule hereto, and coloured green on the said plan, a solid embankment (hereinafter referred to as 'the new embankment') for the purpose of carrying the company's authorized tramroad No. 2 across the marsh lands situate

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between the vendor's enclosed lands (of which the lands described in the said First Schedule hereto form part) and the boundary of the vendor's estate in the Hundred End Gutter, where the new embankment will join on to a similar embankment to be constructed by the company across the marsh lands forming part of the estate of the trustees of the will of the late Charles Scarisbrick." The geographical position was that Sir Thomas Hesketh was entitled to the lands coloured red lying on the east side of a long rectangular strip of marsh land, and the Scarisbrick trustees were the owners of other lands lying on the west side of that strip; the embankment was to come along the Scarisbrick land, across the marsh land, and then along the Hesketh land, and the easement in question was an easement over the intervening strip of marsh land. By article 5 of the agreement, which is that upon which the question mainly turns, it was provided that "The company shall construct and thereafter maintain the new embankment for the purpose of carrying tramroad No. 2 across the marsh lands of the vendor in manner aforesaid as a solid embankment. Such embankment shall be constructed in the line shewn on the said plan and be formed so as to connect the existing sea banks and be sufficient to prevent ingress of the tidal waters. The company shall provide and maintain in such embankment a sufficient culvert with suitable stop valve as an outlet for the waters of Hundred End Gutter." That agreement having been executed, it was followed by the conveyance of October 1, 1906, by which the red lands were conveyed to the company, the easement over the green lands was granted to them, and a covenant was entered into by the company that they would "construct execute and maintain, observe, and perform the several works matters and things specified and contained in" (among others) article 5 of the agreement of March 26, 1906. There was created therefore in the company towards Sir Thomas Hesketh a contractual obligation by way of covenant to construct the particular embankment and culvert mentioned in article 5. That article for the present purpose divides itself into two parts. The first part imposes on the company an obligation to make and maintain the new embankment for the purpose of carrying the tramroad. When the company subsequently obtained the

abandonment Act, there was no longer to be any tramroad No. 2; the purpose for which the embankment was to be constructed had come to an end; and the obligation to construct the embankment for the purpose of carrying the tramroad, no doubt, died with the undertaking. But there is a second part of the article, which is that "the embankment shall be constructed in the line shewn on the said plan, and be formed so as to connect the existing sea banks and be sufficient to prevent ingress of the tidal waters." That clause is a provision in favour of Sir Thomas Hesketh. It is a clause which provides that this embankment shall be so constructed as to give him a particular benefit, namely, the keeping of the tidal water off his marsh lands, and reclaiming those lands so that they shall no longer be covered by the tide at high water. What subsequently happened was that on August 16, 1909, the company obtained the abandonment Act, which contained provisions for the dissolution and winding up of the company. By s. 13 of that Act, which relates to the application of the deposit funds, we are referred back to s. 50 of the Act of 1900.

The question upon the terms of that section arises thus. The company never made the tramroad No. 2; they have not entered upon Sir Thomas Hesketh's lands at all. They have not made any embankment, or done anything under their Act; and under existing circumstances they never will make the tramroad, or the embankment for the purpose of carrying the tramroad. The question is whether Sir Thomas Hesketh is, under these circumstances, entitled to claim against the deposit fund in respect of compensation for breach of the covenant contained in the indenture of October 1, 1906.

The law on this subject is not open to dispute. It was decided by this Court in the case of *In re Potteries, Shrewsbury, and North Wales Ry. Co.* (1), first, that, in a section such as s. 50 of the Act of 1900, the words "commencement, construction or abandonment" are to be read disjunctively; that, if a person has a claim in respect of damage by reason of the abandonment of the undertaking, it is not necessary for him to shew, in order to entitle him to claim against the deposit fund,

(1) 25 Ch. D. 251.

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that there has been any commencement or construction; it is enough for him to shew that there has been abandonment and that he has suffered damage through that abandonment. Another point decided in that case is that, in measuring the damage by reason of the abandonment of the undertaking, the value of the land immediately before has to be contrasted with its value immediately after the abandonment took place, and the landowner is entitled to claim in respect of the difference between the two. The matter came again before this Court in the case of *In re Ruthin and Cerrig-y-Druidion Railway Act.* (1) In that case it was decided that the injuries in respect of which the landowner is entitled to claim against the deposit fund are injuries which result from the commencement, construction, or abandonment of the undertaking, as the case may be; but that he cannot claim in respect of collateral obligations the breach of which is not necessarily involved in such commencement, construction, or abandonment. Cotton L.J. puts the matter thus (2): "It is clear that damages for a mere breach of covenant do not come within the section of the Act of Parliament; but I think you must take into account all the incidents before and after the abandonment; and there may be cases where there is such a covenant that the mere abandonment of the railway makes its performance impossible, and in such case I am of opinion that the consequent loss may be taken into account in estimating the deterioration of the value of the land." One of the covenants in that case was to erect a station on the claimants' land. There cannot be a station, in the sense of a stopping place for trains, unless there is a permanent way for trains to run upon. It was therefore held that injury to the value of the land resulting from the non-erection of a station would create a claim against the deposit fund. The Lord Justice says: "A station meant not a mere building, but a place where the trains were to stop on the railway. But where there is no railway there can be no station, therefore the abandonment of the railway is of necessity a breach of the covenant to make the station." Another question arose in that case in respect of the breach of a covenant to erect fences. Fences could be

(1) 32 Ch. D. 438. (2) 32 Ch. D. 442.

erected, although they might not be required for the purposes of a railway. Upon that question the Lord Justice said (1): "As regards the other point, namely the covenant to put up and maintain the fence, the abandonment of the railway did not necessarily involve the breach of the covenant to make fences. I therefore doubt whether it is a case in which the covenant could be taken into account in assessing the deterioration of the land in value." Lindley L.J. put the matter epigrammatically in a very few words which I will read. He said (2): "The mere existence of such a covenant may increase the value of the land, but we must not confuse the abandonment of the railway with a breach of covenant. The abandonment may diminish the value of the land. The railway may be made but the covenants be broken, or the railway may be abandoned, and yet the covenants be performed. If the abandonment and the breach are undistinguishable, then the case may be within the Act, but when you can distinguish between the breach of covenant and the abandonment you can only claim in respect of the abandonment." The word "claim" in that passage of course means "claim against the deposit fund." What, therefore, I have to consider is this. Here is a covenant by the company with the landowner which has been broken; did the breach of covenant necessarily follow upon the abandonment of the undertaking, and is it undistinguishable from it? Did it necessarily result from the abandonment, in the sense in which the absence of a station as a stopping place for trains results from the abandonment of the railway; or is the case one in which the undertaking may be abandoned and yet the covenant may be performed? Did the abandonment of the tramroad make "impossible" the construction of the embankment? I answer No. The tramroad may be abandoned, and yet the covenant may be performed. The obligation expressed in the first words of article 5 of the agreement that the embankment shall be made for the purpose of carrying the tramroad cannot be performed, but it is immaterial to Sir Thomas Hesketh whether there is a tramroad on it or not. The material part of the agreement, so far as he is concerned, lies in the next

(1) 32 Ch. D. 443. (2) 32 Ch. D. 444.

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following words, which provide that an embankment shall be constructed, which will prevent the ingress of the tidal water. It is quite possible to make such an embankment, although there is to be no tramroad on it. The abandonment of the tramroad does not involve the abandonment of a dam across this piece of marsh land which will prevent the ingress of the tidal waters. This is really the whole matter for decision. The company having procured an abandonment Act, they have, of course, no longer any power to make an embankment for the purpose of constructing a tramroad along the top of it; but it is still possible for them to make an embankment which shall keep out the tidal water from the marsh land. They have covenanted that they will make such an embankment, and that is not rendered impossible by the abandonment of their undertaking.

In my opinion the case falls upon the side of the line on which, unfortunately, the learned judge below thought that it did not fall. The breach of this covenant did not, I think, necessarily result from the abandonment of the undertaking. The case, therefore, comes within the words of Cotton L.J. which I have quoted, as being one in which the covenant is not "such a covenant that the mere abandonment of the" undertaking "makes its performance impossible," and within the words of Lindley L.J., as being one in which the undertaking "may be abandoned, and yet the covenants be performed." Under these circumstances I think that the respondent can have no claim against the deposit fund, and, as I said at the outset, there is no question on this appeal as to whether he is entitled as against the general assets of the company to come in and prove for the breach of covenant. For these reasons I think the appeal must be allowed.

KENNEDY L.J. I am of the same opinion. The reasons for the conclusion at which we have arrived have been so fully expressed by Buckley L.J. that I need say very little. However, as we are differing from Warrington J., I will refer to a passage in his judgment which explains his having taken a view which I venture to think erroneous. He appears to have said that the obligation of the company was of such a nature that the

breach of it was a necessary part of the abandonment of the tramway, that the embankment could not be constructed unless the tramroad was constructed, and that the abandonment of the tramroad necessitated the abandonment of the embankment. If that were true, I should agree with the conclusion arrived at by the learned judge. It seems to me, however, that there is, as Buckley L.J. has just pointed out, a fallacy in saying that the embankment could not be constructed because the tramroad was abandoned. The question is whether an embankment within the meaning of the covenant could not be constructed, although the tramroad was not constructed. In my opinion it could. No doubt there would not, after the abandonment of the tramroad, be an embankment carrying a tramway; but, as regards the nature of the injury in respect of which Sir Thomas Hesketh claims against the deposit fund, it is the non-construction of an embankment, whether it carries a tramway or not, which would, if constructed, improve his marsh land, which is now liable to be inundated by the tidal water. Therefore I differ on the finding that an embankment within the meaning of the covenant cannot be constructed unless the tramroad is constructed. The abandonment of the tramroad did, no doubt, necessitate the abandonment of the embankment as an embankment carrying a tramway, but it did not necessitate the abandonment of the embankment in the sense of rendering it impossible to fulfil the covenant for such an embankment as would prevent the ingress of the tidal water over the respondent's marsh land, and so increase the value of that land.

Solicitors for appellant: *Sharpe, Pritchard & Co., for Alsop, Stevens, Crooks & Co., Liverpool.*

Solicitors for respondent: *Patersons, Snow, Kinder & Lawson, for Wilson, Wright & Wilsons, Preston.*

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[1910 S. 1325.]

Company — Debentures — Guarantee — Insurance — Suretyship — Release of Guarantor — "Arrangement or Compromise" — Majority of Debenture-holders binding Minority.

The plaintiff held debentures of the defendant company forming part of an issue secured by a trust deed which provided that the debentures should be guaranteed by the Law Guarantee Trust and Accident Society, Limited, which was to be the trustee for the debenture-holders. By this deed a sinking fund for the redemption of the debentures was to be established; and the company were to pay to the society a remuneration for services as trustee and 10*s.* per cent. premium on the amount of the outstanding debentures. A general meeting of the debenture-holders was to have power by extraordinary resolution to assent to any arrangement or compromise proposed to be made between the company and the debenture-holders, provided that it was one which the Court would have jurisdiction to sanction under the Joint Stock Companies Arrangement Act, 1870, or any statutory modification thereof, if the company were being wound up and the requisite majority at a meeting of the debenture-holders summoned pursuant to that Act had agreed thereto; and an extraordinary resolution duly passed at a general meeting of the debenture-holders was to be binding upon all the debenture-holders whether present or not present at the meeting, and each of the debenture-holders was to be bound to give effect thereto accordingly. Resolutions were passed in December, 1909, for the voluntary winding-up of the society and the winding-up was now being continued under supervision.

At meetings duly convened and held in March, 1910, resolutions were passed by the requisite majority of the debenture-holders of the company releasing the society from the guarantee; increasing the interest on the debenture debt; appointing new trustees of the deed; and discontinuing the sinking fund.

A draft supplemental trust deed was prepared which provided that each debenture-holder should forthwith surrender his debentures to the company and accept new debentures carrying the higher rate of interest but no guarantee by the society. The plaintiff did not attend the meetings nor assent to the resolutions, and he declined to surrender his debentures or give up the guarantee. He brought this action against the company, the society, and the new trustees for a declaration that the resolutions were not binding on him, and for an injunction to restrain the defendants from acting on them:—

Held, that the guarantee was in the nature of a policy of insurance as well as a contract of suretyship and was not destroyed by the disappearance of the debt; that the resolutions were an arrangement or

compromise between the company and the debenture-holders which the debenture-holders could pass and the Court could sanction although the position of a third party was thereby affected; and that the whole scheme of the resolutions was valid and binding on the plaintiff.

THE company was incorporated in the month of October, 1899, and in the year 1903 they issued debentures, 250 of 100*l.* each, for an amount altogether of 25,000*l.* The interest on the debentures was at the rate of 4½ per cent. per annum. In connection with the issue of these debentures a trust deed of March 25, 1903, was executed by the company of the one part and the Law Guarantee and Trust Society, Limited, of the other part. The deed recited, amongst other things, that the society had agreed with the company to guarantee the debentures, and that it was intended that the guarantee in each case should be indorsed on the debenture and should be framed in accordance with the form set forth in the second schedule. Then there were a number of provisions common to trust deeds of this description, the society being in this case the trustee. Amongst those provisions was the usual one that the security should become realizable if the company committed a breach of any covenant or stipulation therein contained. The deed contained a provision for the establishment of a sinking fund and for the redemption of the debentures out of that fund, and in clause 30 a covenant by the company that they would, so long as the society should be under any liability in respect of any guarantee given by the society, pay to it an annual premium at the rate of 10*s.* per cent. per annum on the amount of the debentures under guarantee and for the time being outstanding. By clause 32 it was provided that "The provisions contained in the fifth schedule hereto shall have effect in the same manner as if such provisions were herein set forth." The provisions in the fifth schedule related to the calling of meetings of debenture-holders and what might be done at such meetings. Clause 14 of that schedule provided that "A general meeting of the debenture-holders shall in addition to the power hereinbefore given have the following powers exercisable by extraordinary resolution namely," and amongst them were No. 3, "Power to assent to any modification of the provisions contained in these presents which shall be

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proposed by the company," and No. 4, "Generally power to assent to any arrangement or compromise proposed to be made between the company and the debenture-holders provided that it is one which the Court would have jurisdiction to sanction under the Joint Stock Companies Arrangement Act, 1870, or any statutory modification thereof if this company were being wound up and the requisite majority at a meeting of the debenture-holders summoned pursuant to that Act had agreed thereto." Clause 16: "An extraordinary resolution passed at a general meeting of the debenture-holders duly convened and held in accordance with these presents and if necessary assented to as aforesaid shall be binding upon all the debenture-holders whether present or not present at such meeting, and each of the debenture-holders shall be bound to give effect thereto accordingly." The debentures were described as first mortgage debentures, each debenture containing in the common form an obligation on the part of the company to pay the principal and interest, and a charge upon its undertaking, and a declaration that the debenture was issued upon and subject to the conditions indorsed thereon which were to be deemed part of it. The first of those conditions contained the statement that the holders of the debentures of the said issue were and would be entitled pari passu to the benefit of and subject to the provisions contained in the trust deed. The society underwrote the issue of the debentures and themselves obtained some of the subscribers to them, including the plaintiff. The plaintiff in April of 1903 applied for five debentures, and he made a point in his application of the promised guarantee of the society, and relied on that guarantee as one of the inducements to apply for and take the debentures. The guarantee in pursuance of the contract between the society and the company was indorsed on the debentures and was in these terms: The society "acknowledges that the above debenture was subscribed for on condition and in part consideration that the society would give the guarantee following and accordingly the society hereby guarantees to the registered holder of the above debenture . . . . the payment of the principal moneys (but not bonus) and interest to become due under the said debenture in manner following, that is to say:—(1.) As to interest. If and whenever

the company makes default in the payment of any interest for more than thirty days the society will pay such interest on demand. (2.) As to principal. If the company makes default in the payment of the principal moneys or any part thereof the society will pay the amount upon whichever of the days following shall first happen, namely (*a*) on the 31st day of March 1918 above mentioned "—the date on which the debentures matured—" or (*b*) on the day after the securities for the debenture-holders of the series to which the above debenture belongs shall have been enforced and completely realized and distributed as far as regards the holder of the above debenture. (3.) At any time after the company shall have made default for more than fourteen days in the payment of any of the said principal moneys or interest the society may " call upon the debenture-holder to transfer his debenture to the society. " (4.) If the company makes default for more than thirty days in the payment of any principal moneys or interest secured by the above debenture the debenture-holder must give notice in writing of such default to the society as to interest within six calendar months after the default and as to principal within twelve calendar months after the default." In 1908 a sale of part of the assets was made to a company called Rolls Royce, Limited, partly for cash and partly for shares, and was sanctioned by an extraordinary resolution of the debenture-holders, and a supplemental trust deed was executed. As the result of that sale, and as the result of the sinking fund, some debentures were paid off, and there now remained outstanding 13,000*l.* of the original 25,000*l.*, of which the plaintiff held 500*l.*

Resolutions for the voluntary winding-up of the society were passed on December 13, 1909, and the winding-up was continued under supervision by an order of December 14, 1909. In January, 1910, the company, through its solicitors, requested the liquidator to resign the society's office as trustee. The result of the correspondence between the company and the society, through their solicitors, was that, so far as they were concerned, it was arranged that the society should retire from being trustee, that the company should be free from its liability to pay premiums, and that if possible the society should be

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released from its guarantee under the debentures. It was found that the consent of every debenture-holder to this course could not be obtained. On March 7 two circular letters were sent round to the debenture-holders, one a special notice of a meeting to be called on March 16, and explaining what was proposed to be done, and another containing a form of assent which the debenture-holder was requested to sign. The plaintiff refused to sign that assent. The meeting was held on March 16, and by majorities of more than three-fourths certain resolutions were passed. Part of the scheme as then put forward was that the interest on the debentures should be increased from 4*l.* 10*s.* to 4*l.* 15*s.* per cent., and that the obligation to make payment to the sinking fund should cease.

The resolutions were that the proposal of the company that the debenture-holders should release the society from their contracts of guarantee and that the interest be increased to 4*l.* 15*s.* be approved; that the proposal to appoint two named gentlemen as trustees in the place of the society be approved; that the alteration of the provisions as to the sinking fund be approved; that the necessary deed be prepared to carry that into effect; that the provisions of the supplemental trust deed with reference to shares in Rolls Royce, Limited, being part of the purchase-money be rescinded, and that a deed be prepared to give effect to that resolution. The meeting was adjourned to the 30th for the purpose of approving a draft deed or deeds for carrying the resolutions into effect; and apparently the company and the society were advised in the interval that it might be doubtful whether a resolution directly discharging the guarantee would be effective under the provisions of the schedule to the trust deed, and accordingly a different form was adopted. The draft supplemental trust deed was prepared, which contained, amongst others, a recital in these terms: "And whereas the society has recently become involved in financial difficulties and it is considered desirable in the interests of the holders of the said debentures and of the company and of the society that the society should cease to be trustee of the said deed and that the provisions of the principal trust deed as regards sinking fund and the rate of interest payable on the debentures and the

payment of future premiums in respect of the guarantees given by the society should be altered and that the holders of the debentures should exchange their debentures for new debentures of the company carrying interest at 5 per cent. per annum and not secured by any guarantee of the society and negotiations accordingly took place between the company and the society and terms were provisionally arranged between the company and the society and with a view to giving effect thereto a meeting of the holders of the said debentures was duly convened and held in accordance with the fifth schedule to the principal trust deed and at such meeting an extraordinary resolution of the debenture-holders was passed approving of the arrangement hereinafter set forth and authorizing the trustees to concur with the company and the proposed new trustees in executing a supplemental trust deed in the terms of these presents." Then the draft deed provided in clause 1: "The holder of each of the outstanding debentures which have been issued as aforesaid shall forthwith surrender to the company such debentures and the company shall in lieu thereof issue to him or her a new debenture of the company for the same amount and in similar form but carrying interest at the rate of 5 per cent. per annum as from the 31st day of March 1910 and not carrying any guarantee by the society." Clause 2: "The principal trust deed shall henceforth, subject as hereinafter provided, be read and construed and operate as a security for payment of the said new debentures and the new debentures shall be deemed to be the debentures therein referred to." There were provisions as to the sinking fund, as to the increased rate of interest and getting rid of clause 30, which compelled the company to pay the premiums, and then the society declared that it desired to be discharged from the trust, the new trustees were appointed, and the society made the usual vesting declaration under the Conveyancing Act. That deed, having been prepared, was submitted to the meeting on March 30, which was not only the adjournment of the meeting of March 16, but was also treated as newly summoned by an advertisement in *The Times*, which was the formal notice provided for by the fifth schedule to the trust deed. It was agreed between the parties to the present action

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that the meeting was to be treated as having been duly convened and held. At that meeting, after explanations had been given as to the position of affairs, the debenture-holders by a majority of more than three-fourths passed a resolution, "That the draft supplemental trust deed which has been produced and read to the meeting and for the purpose of identification initialled by the chairman be approved and carried into effect." That draft deed contained a provision requiring each holder to surrender his debenture, and to take in place of it a debenture not carrying any guarantee by the society.

The plaintiff did not attend the meetings and he refused to assent to the resolutions or surrender his debentures. He brought this action against the company, the society, and the new trustees asking for (1.) a declaration that the resolutions and any deed to be executed in pursuance thereof were not and would not be binding on him, or, alternatively, were not and would not be binding so far as purporting to release the society from its guarantee; (2.) a declaration that notwithstanding the resolutions and deed the society remained liable to him; (3.) an injunction to restrain the society from assenting to the resolutions and to restrain the defendants from acting on them and executing any deed in pursuance of them, or, alternatively, from doing so otherwise than on the footing that the guarantee to the plaintiff still remained in force; (4.) alternatively damages against the society.

Cave, K.C., and *G. R. Northcote*, for the plaintiff. The resolutions are not binding on us and they are ultra vires. Even if the resolutions are valid the society is not thereby released; they only cause a modification of the contract as between the company and the debenture-holders. This is not a simple case of principal debtor and surety, in which if the principal is released the surety is also released; it is more like a policy of insurance than a guarantee. We can still sue the society on the guarantee: *Dane* v. *Mortgage Insurance Corporation* (1); *Finlay* v. *Mexican Investment Corporation* (2); *Parr's Bank* v. *Albert Mines Syndicate*. (3)

(1) [1894] 1 Q. B. 54. (2) [1897] 1 Q. B. 517.
(3) (1900) 5 Com. Cas. 116.

The majority had no power to bind the minority in this way. The resolutions are not an "arrangement or compromise" within clause 14, sub-clause 4, of the fifth schedule to the trust deed. They are not a "modification of the provisions contained in" the trust deed within sub-clause 3, for the guarantee is not given by the deed, it is only recited. There is no agreement with the debenture-holders, it is only between the company and the society. An arrangement means an agreement to settle some dispute: *Sneath* v. *Valley Gold, Ld.* (1); *Mercantile Investment and General Trust Co.* v. *International Company of Mexico.* (2) A power to arrange or compromise rights presupposes some dispute about them: Buckley on Companies, 9th ed. p. 271. There was no dispute in this case which required to be arranged. There is no definition of the word "arrangement" in the Joint Stock Companies Arrangement Act, 1870, nor in the Companies (Consolidation) Act, 1908. In the Imperial Dictionary "arrangement" is said to mean "adjustment by agreement." It must be something in the nature of a compromise: *Manning* v. *Eastern Counties Ry. Co.* (3); though it may be that the existence of difficulties would be sufficient: *Walker* v. *Elmore's German and Austro-Hungarian Metal Co.* (4) By the trust deed these resolutions can only be valid if they are such that they could be sanctioned by the Court in a winding-up, and there is no power to make creditors give up their rights against third parties where the assets of the company are not affected: *In re London Chartered Bank of Australia.* (5) Further, we submit that this is a breach of trust on the part of the trustee of the deed, the society.

H. Terrell, K.C., and *J. W. Manning*, for the company and the new trustees. The guarantee was not an independent transaction and it gave rise to no independent relationship between the society and the debenture-holders. The debenture, the trust deed, and the guarantee must be read together. The relationship between the debenture-holders and the society was part of the general security in which all were interested, and an individual debenture-holder could not sue alone on the guarantee. This is

(1) [1893] 1 Ch. 477.
(2) [1893] 1 Ch. 484, n.
(3) (1843) 12 M. & W. 237.
(4) (1901) 85 L. T. 767.
(5) [1893] 3 Ch. 540.

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a guarantee, not a policy of insurance: *In re Denton's Estate* (1); for the society had the same means of knowledge as the debenture-holders. The resolutions were valid and binding on the plaintiff. They are an "arrangement" within clause 14, sub-clause 4, of the fifth schedule to the trust deed. "Arrangement" is a very wide term and is not confined to the settlement of disputes: *Tetley* v. *Taylor*. (2) The Oxford English Dictionary explains it as "the settlement of mutual relations or claims between parties." It is not necessary to go so far, but we maintain that this is even a "compromise," and that in fact there was a dispute within *Mercantile Investment and General Trust Co.* v. *International Company of Mexico*. (3) There is no doubt about the jurisdiction of the Court to sanction this scheme. New debentures are often issued in a winding-up. It was in the power of the majority to give up their debt altogether; they did so, and thereupon the guarantee ceased. They could do that by virtue of the contract and not by operation of law, as in *In re London Chartered Bank of Australia* (4) and other cases which have been cited. If they could in this way indirectly release the guarantee they could do the same directly. The object of clause 14 was to prevent an individual dissentient shareholder from obstructing such a scheme. There has been no breach of trust.

Younger, K.C., and *F. H. Maugham*, for the liquidators of the society. There is no probability that any claims will be made against us under the guarantee, and we are giving up the premium, but we support the scheme because in the circumstances we desire to get rid of every possible liability. The Act of 1908 does not affect the power of the Court to sanction arrangements in a winding-up. It could have sanctioned a simple agreement to give up a security, or to give up shares and take other shares. An agreement to surrender the debentures would cause the guarantee to disappear without any more being said. The thing guaranteed would be lost by accord and satisfaction. This is guarantee, not insurance. The resolutions were a valid settlement of an existing difficulty, the object of the company being to get rid of the society as trustee and of the

(1) [1904] 2 Ch. 178, 188.
(2) (1851) 1 E. & B. 521.
(3) [1893] 1 Ch. 484, n.
(4) [1893] 3 Ch. 540.

payment of premiums. Secured creditors can be bound by such resolutions as these: Buckley on Companies, 9th ed. pp. 270, 278. The word "arrangement" is the widest that can be used; there is no necessity to shew the existence of a dispute; and the Court has jurisdiction to sanction this arrangement: *In re Alabama, New Orleans, Texas and Pacific Junction Ry. Co.* (1) The debenture debt was released, and thereupon the guarantee ceased to exist: *Perry* v. *National Provincial Bank of England* (2); *Bolton* v. *Buckenham.* (3)

Cave, K.C., in reply. A man who takes a debenture with a separate guarantee such as this cannot be deprived of his debentures and also of that guarantee by a vote of the majority of the debenture-holders. There is no accord and satisfaction unless he himself agrees, and here the plaintiff has never given up his debt.

WARRINGTON J. stated the facts, and continued:—Now in the first place considerable discussion has taken place as to the nature of this so-called guarantee: is it or is it not an ordinary contract of suretyship, or is it not rather, although called a guarantee, a policy of insurance against the happening of certain events? If it is necessary to decide the question, in my opinion this document does not embody a mere contract of suretyship. I think this document, which contains an obligation on the part of the society, to arise only in case of default, is more like the documents which were the subject of discussion in the case of *Dane* v. *Mortgage Insurance Corporation* (4) and *Finlay* v. *Mexican Investment Corporation* (5) than the document which was under discussion in *In re Denton's Estate.* (6) Without going more into the matter I think there are material distinctions between this document and the one discussed in *In re Denton's Estate* (6), and no material distinctions between this and the documents discussed in the other two cases. But having got so far, we only arrive at this, that the mere disappearance of the debenture debt would not necessarily destroy the efficiency of the guarantee. But if the resolutions are binding, as the defendants

(1) [1891] 1 Ch. 213.
(2) [1910] 1 Ch. 464.
(3) [1891] 1 Q. B. 278.
(4) [1894] 1 Q. B. 54.
(5) [1897] 1 Q. B. 517.
(6) [1904] 2 Ch. 178.

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say they are, the guarantee would necessarily be gone, because the guarantee is to be of the payment of the money due under these debentures, and the terms of the agreement by which the plaintiff on this assumption is bound require that he shall accept a debenture without the guarantee. It could not then be taken to be an insurance against loss under the fresh debentures, for the debenture-holder is bound to accept them as debentures without guarantees. I think it was the insurance of the original, and could not be taken to be the insurance of the new debentures. That brings me to the real question: Is this transaction, which the debenture-holders have purported to sanction, within the provisions of sub-clause 4 of clause 14 of the fifth schedule; is it one to which the majority can bind the minority; in other words, is that which has been sanctioned an "arrangement or compromise" to be made between the company and the debenture-holders which the Court would have jurisdiction to sanction under the Joint Stock Companies Arrangement Act, 1870, or any statutory modification thereof, if the company were being wound up? I think it is. The position at the time when this arrangement was made was this: The company and the debenture-holders had a society in liquidation as their trustee. The debenture-holders had, as their guarantor, a society in liquidation. The company were liable to go on paying the premiums to the liquidating society. I quite agree that the company might have ceased to pay premiums and the society might have ceased to be trustee and yet the guarantee would have been effective at the suit of a debenture-holder. But it seems to me that, granting that, we still have a position, not only as between the society and the debenture-holders, but as between the company and the debenture-holders, which was, to use the phrase in the deed, capable of "arrangement." Whether the transaction could be called a compromise may be a matter of doubt, but I think on consideration that the position of affairs was one which could properly be said to be the subject of arrangement. Then is it an arrangement between the company and the debenture-holders? I think plainly, when properly regarded, it is an arrangement between them. The company give to the debenture-holders something which they did not have before, namely, the

extra 10*s.* per cent. representing the amount of the premium which the company would have had to pay to the society. On the other hand, the company get the advantage of putting an end to the sinking fund. The company and the debenture-holders get as trustees two gentlemen of whom they both approve in place of the liquidating society, and then as a term, without which that arrangement between the company and the debenture-holders cannot be carried out, the company stipulates that the society shall be released from its guarantee. Now, does the fact that the company stipulates for something which affects an outsider prevent the entire arrangement from being not only an arrangement between the company and the debenture-holders, but an arrangement arising out of circumstances existing between the company and the debenture-holders which call for arrangement? I do not think it does. I think the existence of the guarantee and the fact that without its release the society would not withdraw from their position as trustees, or give up their right to receive the 10*s.* per cent. from the company, was merely one of several incidents in the position which gave rise to the necessity for an arrangement. In my opinion, therefore, assuming that in order that a transaction may be an arrangement or compromise within this clause of the deed it must be something other than a mere agreement for which there was no necessity or occasion, except the desire of the two parties to enter into it, I think in this case there was in the relation between the two parties, and in the position in which they were severally placed, sufficient occasion for an arrangement, if not an arrangement and compromise, between those parties. But that is not quite enough. One must go a little further, because there is a proviso to this clause 4: "Provided that it is one which the Court would have jurisdiction to sanction under the Joint Stock Companies Arrangement Act, 1870, or any statutory modification thereof if this company were being wound up." Now, would the Court have had jurisdiction to sanction this agreement? It has been decided over and over again that the Court has power to sanction an arrangement between a company and secured creditors. That means that it has power to sanction an arrangement which involves the giving up of the existing security and

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the acceptance of a different one. Can it have any less jurisdiction —it is not a question of whether it thinks proper to do so, but can it have less jurisdiction to sanction an arrangement because it contains a stipulation which the company think it necessary to make, and which the debenture-holders who voted in favour of it think it in the interest of the debenture-holders to accept? I cannot see why that stipulation should render the agreement one which the Court would have no jurisdiction to sanction.

On the whole, therefore, in my opinion the resolution is binding on the plaintiff. He suggests as an alternative claim that it may be binding to some extent but not binding so far as it compels him to give up his debenture and accept one without guarantee, but in my judgment it would be contrary to all principle to hold that such a transaction could be binding in part. I think, therefore, the only conclusion I can come to is that the transaction is binding upon him as a whole. The action asks for a declaration to the contrary effect, and I think the proper course to pursue will be to declare that the resolution of March 30 and any deed executed or to be executed in pursuance of that resolution will be binding on the plaintiff.

Solicitors: *Field, Roscoe & Co., for Batesons, Warr & Wimshurst, Liverpool; Claremont, Haynes & Co.; Frere, Cholmeley & Co.*

H. C. R.

In re SEABROOK.
GRAY *v.* BADDELEY.

[1910 S. 3139.]

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Nov. 11.

Power of Appointment — General Power — Execution — Exercise by Will — Appointment of Executors and Bequest of Pecuniary Legacies—Estate of Testatrix insufficient alone to pay Debts and Legacies—Extent of Appointment—Wills Act, 1837 (1 *Vict. c.* 26), *s.* 27.

The execution by the donee of a general power of appointment of a will containing no residuary bequest of personal estate but merely the appointment of executors and bequests of general pecuniary legacies will, in the event of the donee's own estate proving insufficient to pay the debts and legacies, operate under s. 27 of the Wills Act, 1837, as an execution of the power to the extent of the amount necessary to enable both the debts and the legacies to be paid.

Dictum of Wickens V.-C. in *In re Davies' Trusts*, (1871) L. R. 13 Eq. 163, 166, followed.

Adjourned Summons.

Selina Seabrook, by her will dated March 1, 1889, devised and bequeathed the residue of her real and personal estate to trustees upon trust to sell and to invest the proceeds as therein mentioned, and she declared that her trustees should stand possessed of one third part of the trust funds and securities upon trust to pay the annual income arising therefrom unto her daughter Selina Mary Seabrook for life, and she declared that her trustees should upon the death of her said daughter stand possessed of the said one-third of the said trust funds and securities upon trust for such person or persons as her said daughter should by her last will or by any codicil direct or appoint, and in default of such direction or appointment in trust for the next of kin of her said daughter.

Selina Seabrook died on March 17, 1889.

Selina Mary Seabrook, by her will dated February 15, 1910, made specific devises of her real estate and directed that the "remainder of my property in houses and lands" should be equally divided among all her nephews, with the condition that they should pay to each of her three nieces the sum of 500*l.* She then made certain specific bequests and concluded her will as

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follows: "And I appoint as executors of this my will Wilfred Baddeley . . . . Alfred Gray and . . . . Mrs. Philip Seabrook to each of whom I direct to be paid for their services the sum of 50*l.*" The will contained no residuary gift of personal estate.

Selina Mary Seabrook died on February 17, 1910.

A question having arisen whether Selina Mary Seabrook by her will exercised the power of appointment given her by the will of Selina Seabrook over a one-third share of the proceeds of sale of her residuary real and personal estate, the present summons was taken out by the surviving executor and trustee of the will of Selina Seabrook for the determination (inter alia) of that question.

It appeared from the evidence that if the power of appointment was exercised the estate of Selina Mary Seabrook was more than sufficient to pay her debts and funeral and testamentary expenses and the legacies bequeathed by her will, but that if the power of appointment was not exercised her personal estate was far from sufficient to pay them.

T. T. Method, for the summons, stated the facts and referred to *Hawthorn* v. *Shedden* (1), *In re Davies' Trusts* (2), and the Wills Act, 1837, s. 27.

Percy Wheeler, for the executors of Selina Mary Seabrook's will. The will of S. M. Seabrook is a proper exercise of the power of appointment given her by her mother's will for the purpose of paying the legacies: *Hawthorn* v. *Shedden* (1); *In re Wilkinson.* (3) Until the debts are discharged the legacies given by the will cannot be paid. It is submitted, therefore, that the bequest of the legacies operates as an appointment of a sufficient part of the funds to enable both the debts and the legacies to be paid.

R. H. Hodge, for the next of kin of S. M. Seabrook.

WARRINGTON J. The first question in this case is whether the will of Selina Mary Seabrook contained an appointment, under a general power of appointment, of property sufficient with her own property to pay her debts and the legacies given by her

(1) (1856) 3 Sm. & Giff. 293. (2) L. R. 13 Eq. 163.
(3) (1869) L. R. 4 Ch. 587.

will. [His Lordship stated the facts, and continued:—] The question is, How far did the will of Selina Mary Seabrook operate to exercise the power of appointment given to her by the will of Selina Seabrook? Sect. 27 of the Wills Act, 1837, on which the question turns, provides that "a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will." It was decided in *Hawthorn* v. *Shedden* (1) that the appointment of executors, coupled with the gift of pecuniary legacies, operated as an appointment of a fund which was the subject of a general power of appointment to the extent of the amount which was required for the payment of the legacies. That decision seems to involve this further proposition—that if the estate of the donee of the power is, apart from the fund to which the power applies, insufficient for the payment of the debts of the donee, the appointment of the fund must be taken to extend to such an amount as is sufficient for the payment, not only of the legacies, but of the legacies and debts, inasmuch as the debts must be discharged first before the legacies can be paid. I think that is the view expressed by Wickens V.-C. in *In re Davies' Trusts* (2), although it does not amount to a decision on the point. The Vice-Chancellor says (3): "It must also, I think, be considered settled law that where a testator, with a general power of appointment, gives legacies and appoints an executor, he must be taken as exercising his general power to the extent to which the fund subject to it is required to make the legacies effective. And even that where a testator having such a power makes a will directing the payment of his debts without more and appointing an executor, the appointed fund is liable for the payment of his debts if his own estate is insufficient. The same rule would, I conceive, apply in both these cases, though no executor were appointed. It has not yet

(1) 3 Sm. & Giff. 293. (2) L. R. 13 Eq. 163.
(3) L. R. 13 Eq. 166.

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been decided that an appointment of an executor without more would, since the Wills Act, 1 Vict. c. 26, make the fund assets. And so to hold would appear to give a very unnatural construction to sect. 27 of the Wills Act as to the execution of powers by a general disposition." And then comes this passage, which for the present purpose is the important part of the judgment: "Having regard to the 27th section, it seems not unreasonable to hold that a testator having a general power, and directing a certain application of his property, must be taken in all cases to exercise the power to the extent to which the direction is effectual. The difficulty lies in extending this rule to cases where the direction is ineffectual." Assuming, then, that the gift of the legacies is to some extent an exercise of the power, namely, to the extent of the amount required to pay the legacies, it must also, I think, be an effectual exercise of the power to the extent which is necessary to enable that payment to be carried into effect. I must hold, therefore, that the will of Selina Mary Seabrook operated as an exercise of the general power of appointment which she possessed under the will of Selina Seabrook over the one-third share of the trust fund to such an extent as would be sufficient to enable the executor of Selina Mary Seabrook to pay with the aid of her own property her debts and the legacies given by her will.

Solicitors for all parties: *F. P. & H. Baddeley.*

W. I. C.

BOEHM *v.* GOODALL.

WARRINGTON J.

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Nov. 24.

[1907 B. 1341.]

Receiver—Partnership Action—Consent Order appointing Receiver and Manager—Payments by Receiver—Insufficiency of Assets—Indemnity—Claim against Partners personally.

In an action for dissolution of partnership a receiver and manager was, by a consent order, appointed to carry on the partnership business with a view to its sale as a going concern. In carrying on the business the receiver and manager made payments which the assets were insufficient to satisfy in full and claimed to be indemnified by the partners personally in respect of the balance due to him:—

Held, that the receiver was an officer of the Court and could only look to the assets under the control of the Court for his indemnity.

Held, therefore, that he was not entitled to be indemnified by the partners personally, and that the fact that the order appointing him was made by consent of the partners did not put him in any better position as against them.

Adjourned Summons.

The action was an ordinary partnership action brought by one partner against his co-partners for the dissolution of the partnership and the winding-up of the partnership affairs. The business of the partnership was the working of certain mines, minerals, and quarries situate at Caldbeck and Uldale, in the county of Cumberland, held under a lease dated November 1, 1905.

On April 9, 1907, the writ in the action was issued.

On July 12, 1907, the plaintiff moved for the appointment of a receiver and manager of the partnership business, and on the hearing of the motion (which the parties agreed should be treated as the trial of the action) a consent judgment (dated July 15) was pronounced. The Court thereby declared that the partnership ought to be dissolved as from July 12, 1907 (the date of the motion), and, all parties thereunto consenting, the Court directed (1.) an inquiry who were the persons interested in the partnership and in what shares and proportions; (2.) an account of all dealings and transactions between such interested persons as co-partners from June 21, 1905; and (3.) an account of what

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the credits, property, and effects then belonging to the partnership consisted. The Court then ordered that the partnership business, with the goodwill, assets, and effects, be sold as a going concern, and that the money to arise by such sale be paid into Court to the credit of the action, and, the plaintiff undertaking to be answerable for what James Todd, the receiver and manager thereinafter appointed, should receive or become liable to pay until he should have given security, the Court appointed James Todd to collect, get in, and receive the debts then due and outstanding and other assets, property, and effects belonging to the partnership and to manage the same. A period was limited beyond which the receiver was not to act, and a direction was given that he should give security, and the order contained the common form of direction for delivery over by the plaintiff and defendants to the receiver of the stock in trade and effects, securities, and books and papers of the partnership. The order proceeded: "And it is ordered that the said James Todd do out of the first moneys to be received pay the debts due and to become due from the said partnership." Then there was the ordinary direction to the receiver to pass his accounts and pay his balances.

On September 3, 1907, an order was made authorizing the receiver to borrow a sum not exceeding 500*l.* on the security of the partnership assets, property, and effects, such security to be a first charge thereon subject to the costs of realization and the receiver's remuneration, for the purpose of enabling him to carry on the partnership business as a going concern and preserving the lease of the Caldbeck mine from forfeiture and paying the wages and other outgoings and meeting the liabilities in connection with the partnership business.

In January, 1910, the assets of the partnership were sold and the proceeds of sale paid into Court to the credit of the action.

Subsequently to the sale the receiver duly passed his first and final account as receiver and manager, and by a certificate of the Master dated June 3, 1910, it was certified that there was due to the receiver as the balance of such account the sum of 1020*l.* 2*s.* 7*d.*

By an order dated May 14, 1910, the sum of 646*l.* 0*s.* 3*d.*

Consols in Court to the credit of the action representing proceeds of sale was directed to be sold, and the proceeds thereof together with 3*l.* 16*s.* cash in Court on the like credit were directed to be paid to the receiver. The Consols were sold and the proceeds thereof with the cash, amounting in all to the sum of 538*l.* 13*s.* 8*d.*, were received by the receiver out of Court on July 16, 1910, and applied towards repayment of the moneys borrowed by him pursuant to the order of September 3, 1907.

There was now due to the receiver under the Master's certificate the sum of 481*l.* 8*s.* 11*d.*, being the balance due upon his account after giving credit for the money received out of Court. There were no assets of the partnership available for the payment of this balance.

This was a summons taken out in the action by the receiver asking that the plaintiff and defendants (other than one who had become bankrupt and whose trustee in bankruptcy had been added as a defendant) might be ordered (1.) to pay to him the balance of 481*l.* 8*s.* 11*d.* due to him; (2.) that he might be discharged and his security vacated; and (3.) that if necessary for the purposes aforesaid the plaintiff and the defendants might be directed to prosecute forthwith the judgment in the action.

Cave, K.C., and *T. E. Mansfield*, for the summons. Having regard to the fact that the order appointing the receiver was by consent, the receiver must, it is submitted, be taken to have undertaken the management of the partnership business and to have made the expenditure and incurred the liabilities at the request of the partners. That being so, the law implies a promise on their part to repay him: Addison on Contracts, 10th ed. p. 421.

[WARRINGTON J. The receiver is an officer of the Court and must look to the Court to indemnify him out of the assets.]

No doubt as between himself and third parties the receiver is a principal and not an agent of the partners. But as between himself and the partners he is in a fiduciary capacity and is entitled to be indemnified by them. His position is analogous

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to that of a trustee. A trustee is not confined to his indemnity out of the trust estate, but is entitled to be indemnified by the beneficiaries personally: *Hardoon* v. *Belilios.* (1) The same is the case with regard to directors of a company who, although not trustees for the company, are entitled to the same right of indemnity: *Ex parte Chippendale.* (2) So too are receivers and managers in debenture-holders' actions: *Strapp* v. *Bull, Sons & Co.* (3); *Burt, Boulton & Hayward* v. *Bull.* (4)

Although a receiver and manager appointed in a partnership action has primarily to look to the assets for his indemnity, yet he is really carrying on the business of the partnership for the partners so as to make them liable for loss.

[WARRINGTON J. The Court does not appoint a receiver and manager of a business except for the purpose of its realization: *Gardner* v. *London, Chatham, and Dover Ry. Co.* (5)]

Further, in regard to the money expended in payment of rent, the receiver is, it is submitted, in a special position, and is entitled to be subrogated to the rights of the lessor.

[WARRINGTON J. The same principle would equally apply to the case of any trade debt.]

The receiver must put his case as high as that. Here the rent became due, the receiver borrowed money to pay it and paid it, and the partners have taken the benefit of that payment without repaying him. He is therefore entitled to stand in the lessor's shoes—*Blackburn Building Society* v. *Cunliffe, Brooks & Co.* (6); *Bannatyne* v. *MacIver* (7)—and to appropriate the money received by him out of Court to the payment of the wages and other outgoings paid by him in connection with the partnership business.

In any case, it is submitted that the parties ought to prosecute the judgment in the action, as, if that were done, assets might possibly result out of which the receiver could be paid.

J. W. M. Holmes, for the plaintiff, took no part in the argument.

(1) [1901] A. C. 118, 124.
(2) (1854) 4 D. M. & G. 19.
(3) [1895] 2 Ch. 1, 6.
(4) [1895] 1 Q. B. 276, 284.
(5) (1867) L. R. 2 Ch. 201.
(6) (1882) 22 Ch. D. 61, 71.
(7) [1906] 1 K. B. 103.

W. R. Sheldon, for another partner. There is no recorded case in which a personal claim like the present has been made, the reason presumably being that no one has ever thought that such a claim could succeed. The Court by appointing a receiver and manager of the business of the partnership in effect assumed the management of it into its own hands: *Gardner* v. *London, Chatham, and Dover Ry. Co.*(1) The receiver is the officer and servant of the Court and not of the partners: *In re Flowers & Co.* (2)

[He was stopped.]

R. Roope Reeve, for another partner, was not called upon.

WARRINGTON J. This is an application made in a partnership action, not by one of the parties to the action, but by a gentleman who has been appointed receiver and manager of the partnership property by an order of the Court, and his application is that the plaintiff and the defendants (other than one who is in a particular position) may be ordered to pay him what is, in effect, the balance found due to him on taking his accounts, and that, if necessary for this purpose, the plaintiff and the defendants may be directed to prosecute forthwith the judgment in the action.

The facts are very short. [His Lordship stated the facts substantially as above set out, and continued:—]

The receiver puts his case on two grounds. First, he says that he undertook at the request of the partners, who all consented to the order of July 15, 1907, to perform certain duties on their behalf, and that any expenditure made or liabilities properly incurred by him in the performance of those duties was so made or were so incurred by him on an implied promise of indemnity arising out of the relation of the parties, or, if not that, out of the fact that the expenditure was made and the liabilities were incurred at the request of the partners. Secondly, he says that, at all events so far as the balance is made up of moneys expended by him in the payment of rent or other debts for which the partners were liable, he is entitled under the doctrine of subrogation to stand in the

(1) L. R. 2 Ch. 201, 211. (2) [1897] 1 Q. B. 14, 15.

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place of the creditors whom he has paid and so recover from those who are the ultimate debtors.

Cases have been referred to on the first point which establish this, with regard to trustees and persons who stand in a fiduciary capacity towards those for whom they act, that such persons in incurring liability and making expenditure in the proper performance of their duties are entitled to be indemnified, not only out of the property in respect of which they are trustees, but also by the beneficiaries personally. The whole question I have to determine is whether the principle of those cases is applicable to the case of a receiver and manager appointed by the Court. What is the position of such a receiver and manager? It is described by Lord Cairns (then Sir Hugh Cairns L.J.) in *Gardner* v. *London, Chatham, and Dover Ry. Co.* (1) thus: "When the Court appoints a manager of a business or undertaking, it in effect assumes the management into its own hands; for the manager is the servant or officer of the Court, and upon any question arising as to the character and details of the management, it is the Court which must direct and decide." The same point was dealt with by Lord Esher M.R. in *Burt, Boulton & Hayward* v. *Bull.* (2) He says: "What is the position of such a receiver and manager? He is not the agent of the company"—in that case the receivers and managers had been appointed in a debenture-holders' action. "They do not appoint him; he is not bound to obey their directions; and they cannot dismiss him, however much they may disapprove of the mode in which he is carrying on the business. Only the Court can dismiss him, or give him directions as to the mode of carrying on the business, or interfere with him, if he is not carrying on the business properly." Then later he says: "Therefore there might be cases in which such a manager would not be personally liable,"—that is, for goods which he orders in the ordinary course of his management—"but, if there is no special stipulation of that kind, and, if the terms of the order merely amount to a statement that the giver of it, being a manager appointed by the Court, gives such an order, then I think the only business inference is that the tradesman is to look to the

(1) L. R. 2 Ch. 201, 211. (2) [1895] 1 Q. B. 276, 279, 280, 284.

personal credit of the manager, and that the manager trusts to the funds in hand or the other assets of the concern for indemnity." The two Lords Justices who took part in that decision adopted the same view of the position of the receiver, namely, that he was not the agent of the company nor of the plaintiffs, but was an officer of the Court, and personally liable for the obligations he might incur. Rigby L.J. does, it is true, in one passage of his judgment use an expression which suggests that he thought the receiver might look ultimately to certain persons for reimbursement; he speaks of "looking for indemnity to the assets or the persons for whose benefit ultimately the business was carried on." Whether he really considered the question of personal indemnity or not I do not know, but no authority which has been cited to me comes near the point for which the receiver is contending.

Do the principles of the cases with reference to trustees or persons standing in a fiduciary capacity apply to the case of a receiver and manager appointed by the Court? I cannot come to the conclusion that they do without running counter to the decisions in all the cases relating to receivers and managers appointed by the Court. Such a receiver and manager is not the agent of the parties, he is not a trustee for them, and they cannot control him. He may, as far as they are concerned, incur expenses or liabilities without their having a say in the matter. I think it is of the utmost importance that receivers and managers in this position should know that they must look for their indemnity to the assets which are under the control of the Court. The Court itself cannot indemnify receivers, but it can, and will, do so out of the assets, so far as they extend, for expenses properly incurred; but it cannot go further. It would be an extreme hardship in most cases to parties to an action if they were to be held personally liable for expenses incurred by receivers and managers over which they have no control. But the receiver here says that this is not the ordinary case, because the judgment appointing him was by consent and, by consenting, all the parties have impliedly requested him to incur these liabilities. In my opinion that fact makes no difference at all. If I were to accede to that argument, I should

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have to hold in every case that the person who puts the Court in motion and gets a receiver appointed would have to indemnify the receiver. The fact that the order was made by consent does not, in my opinion, distinguish this case from the numerous cases in which orders have been made without consent.

The receiver also puts his case on another ground. He says that he has paid certain special and urgent debts and is entitled to be subrogated to the rights of the creditors. That is, in good truth, the same ground over again, because he could only be entitled to be subrogated if he had paid the debts at the request, express or implied, of those whose debts they were. The cases referred to are all cases where the person who paid the debt stood in the position of agent of the debtor. It is true that in those cases the payments were in excess of the authority of the agent and yet he was held entitled to be indemnified so far as no loss was occasioned to the assets of the principal by what had been done. Those cases all depend on the fact that the persons making the payments were agents of the debtor and therefore do not apply to the present case.

Then it is said that the parties ought to prosecute the judgment in the action and that there might then be a fund out of which the receiver could be paid, but that contention breaks down on the facts. The assets have all been realized, and there is nothing for the Court to do except to settle the rights of the partners inter se. That will not bring in any assets to the firm. It would merely determine whether money is due from A. to B. and what sum, if any, but it would not bring in any assets out of which the Court could indemnify the receiver. I have not expressly referred to the fact that the order appointing the receiver contained the usual form of direction to the receiver to pay the debts due and to become due from the partnership out of the first moneys to be received by him, but it must not be forgotten that there is in the order no express authority to the receiver to incur debts or do anything for which he could look to be indemnified except out of the assets.

The application fails, and I must refuse it. I think, therefore, that I must make no order on the summons except that, as the applicant is not a party to the action, he must pay the costs of

the parties whom he has served, other than the plaintiff who does not ask for them.

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Solicitors: *H. A. Taylor; Ingle, Holmes, Sons & Pott; Dennison, Horne & Co., for E. S. Taylor, Birmingham; W. E. Aldis, for J. Hall-Wright, Birmingham.*

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[1910 E. 1174.]

Company—Memorandum of Association—Increase of Capital — Alteration of Rights of Preference Shareholders—Sanction of Preference Shareholders by Resolution at separate Meeting—All Preference Shares held by one Person —"Meeting."

A company was incorporated with a capital divided into preference and ordinary shares. The memorandum of association empowered the company to increase its capital, but provided that no new shares should be issued so as to rank equally with or in priority to the preference shares, unless such issue was sanctioned by an extraordinary resolution of the holders of the preference shares present at a separate "meeting" of such holders specially summoned for the purpose of considering the question. The articles of association contained a similar provision.

Shortly after the incorporation of the company meetings were held at which a special resolution was passed and confirmed increasing its capital by a fresh issue of preference shares. At that time B. was the holder of all the original preference shares. He presided at the first meeting, moved the resolution for the issue of the new preference shares, and signed a document in the minute-book recording his assent as the holder of all the original preference shares to the issue of the new preference shares. In pursuance of this resolution and in reliance on B.'s assent the new preference shares were subsequently issued:—

Held that, there being nothing in the constitution of the company to prevent the whole of the original preference shares being held by one shareholder, the word "meeting" in the memorandum and articles must be taken to have been used not in its strict sense, but as applicable to the case of a single shareholder:—

Held, therefore, that there had been a sufficient compliance with the requirements of the memorandum and articles, and that the new preference shares had been validly issued.

Sharp v. *Dawes*, (1876) 2 Q. B. D. 26, and *In re Sanitary Carbon Co.*, [1877] W. N. 223, distinguished.

MOTION.

Bennett Brothers, Limited, was incorporated in May, 1904,

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with a capital of 25,000*l.* divided in 25,000 shares of 1*l.* each, of which 10,000 were 6 per cent. cumulative preference shares and 15,000 ordinary shares.

Clause 5 of the memorandum of association (so far as material) provided that "The company has power from time to time to increase or reduce its capital, and to issue any shares in any increased capital as ordinary, preferred, or deferred shares, and to attach to any class or classes of such shares such preferences, rights, privileges, or conditions, or to subject the same to such restrictions or limitations as may be determined by the company in general meeting, but so that no new shares shall be issued so as to rank equally with or in priority to the said cumulative preference shares, unless such issue is sanctioned by an extraordinary resolution of the holders of the cumulative preference shares present at a separate meeting of such holders specially summoned for the purpose of considering the question. So long as the capital of the company is divided into shares of various classes the rights and privileges of any class of shares shall only be modified or varied in the manner following: namely—A modification or variation of the rights of any class of shares may be effected when sanctioned by an extraordinary resolution of the holders of the shares of such class passed at a separate meeting of such holders, at which there shall be present in person or represented by proxy the holders of not less than three fourths of the issued shares of such class."

Article 46 was as follows:—

"So long as the capital is divided into shares of various classes, the rights and privileges of the holders of shares of each class may be varied or modified by any arrangement which is sanctioned on the one hand by an extraordinary resolution of the holders of the shares of such class, and on the other hand by a like resolution of the holders of the remaining shares of the company, each such resolution being passed at a separate meeting of the members entitled to vote thereat. Meetings of the holders of a class of shares shall be subject, so far as possible, to the same rules and provisions as the meetings of the company, but so that the quorum of the members of the class affected shall be the holders of shares of that class present

in person or represented by proxy holding not less than three fourths of the issued shares of that class."

In June, 1904, the company was desirous of increasing its capital, and for that purpose of issuing an additional 10,000 6 per cent. cumulative preference shares. At that time Joseph Bennett, junior, was the sole holder of all the original 10,000 6 per cent. cumulative preference shares.

On June 20, 1904, an extraordinary meeting of the company (which had been duly convened) was held, at which Bennett took the chair. At that meeting a resolution was proposed by Bennett and seconded by another shareholder and carried unanimously:—

"That the capital of the company be increased from 25,000*l.*, divided into 10,000 6 per cent. cumulative preference shares and 15,000 ordinary shares of 1*l.* each, to 40,000*l.*, divided into 20,000 6 per cent. cumulative preference shares and 20,000 ordinary shares of 1*l.* each, by the creation of 10,000 6 per cent. cumulative preference shares and 5000 ordinary shares of 1*l.* each, such preference and ordinary shares to rank pari passu in all respects with the preference and ordinary shares respectively already existing: and that the directors be and they are hereby empowered to issue such shares at such times, to such persons, and on such terms (not being less than par) as they may from time to time think fit."

On the same day Bennett signed in the minute-book of the company a document in the following terms:—

"I the undersigned Joseph Bennett, junior, hereby record my consent as the holder of all the preference shares issued by Bennett Brothers, Limited, to the increase by the company of its capital from 25,000*l.* divided into 10,000 six per cent. cumulative preference shares and 15,000 ordinary shares of one pound each to 40,000*l.* divided into 20,000 six per cent. cumulative preference shares and 20,000 ordinary shares of one pound each by the creation of 10,000 six per cent. cumulative preference shares and 5000 ordinary shares of one pound each, such preference shares to rank pari passu in all respects with the preference shares held by me."

The resolution passed at the meeting was duly confirmed as a

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special resolution at a meeting of the company held on July 5, 1904.

Acting on this resolution and on the express formal consent of Bennett contained in the document signed by him, the company issued the new 10,000 6 per cent. cumulative preference shares numbered 30,001 to 40,000, both inclusive, which were now standing in the names of a number of persons specified in the plaintiff's affidavit in support of the motion.

The company was now proposing to issue fresh capital, and the question arose whether the preference shares issued in 1904 were validly issued. In order to have this question determined the plaintiff, who was the holder of 400 of these shares, brought the present action, on behalf of himself and all other the persons registered as holders of these preference shares, against the company, claiming by his writ (1.) a declaration that notwithstanding the special resolution the company had never been entitled to issue any of the 10,000 preference shares, and that the same had not been duly issued to the plaintiff and the other persons whose names were entered in the share register of the company as holders thereof; (2.) rescission of all contracts to take the said shares and rectification of the share register; (3.) repayment of the 1*l.* per share paid up thereon respectively with interest; and (4.) that the company might be restrained by injunction from paying any dividends upon the said shares or otherwise treating the plaintiff and the other persons aforesaid as members of the company in respect of the shares.

The plaintiff now moved for an interim order in the terms of the writ.

E. J. Elgood, for the plaintiff. Under the memorandum and articles of association it was a condition precedent to the issue of the new preference shares that a "meeting" of the preference shareholders should have been held at which a resolution should have been passed sanctioning the issue of such shares. Here no such meeting was held. One person does not make a meeting: *Sharp* v. *Dawes* (1); *In re Sanitary Carbon Co.* (2); Buckley's Companies Acts, 9th ed. p. 604. Bennett by himself, therefore,

(1) 2 Q. B. D. 26. (2) [1877] W. N. 223.

could not constitute a "meeting" of the preference shareholders, and the document which he signed was not equivalent to a resolution of a "meeting" of those shareholders.

Gore-Browne, K.C., and *R. E. Otter*, for the company.

[WARRINGTON J. The present case is rather different from *Sharp* v. *Dawes* (1) and *In re Sanitary Carbon Co.* (2) because there other shareholders existed who could have attended the meeting besides the one who did. Here Bennett was the only person who could attend a meeting of the preference shareholders.]

Bennett was the only person who was interested in the preference shares, and he gave his formal consent to the issue of the new preference shares. Under the circumstances of this case it is submitted that that consent was equivalent to the resolution of a meeting of the preference shareholders. No one can be prejudiced by the Court holding that the new shares were validly issued. In *Sharp* v. *Dawes* (3) Lord Coleridge C.J. said that it was possible to shew that the word "meeting" had a meaning different from the ordinary meaning. In the present case it is submitted that the word "meeting" was not used in its ordinary sense, and that where, as here, the whole of an issue of shares of a particular class is held by one person, the solemn declaration of that person is equivalent to an act done at a "meeting" of the shareholders of that particular class of shares.

[*E. J. Elgood.* In *In re Taurine Co.* (4) it was held that a committee of a board of directors need not consist of more than one person.]

WARRINGTON J. This is a most extraordinary case. It is a motion in an action brought by the plaintiff, on behalf of himself and all other the persons registered as holders of the preference shares in the company numbered 30,001 to 40,000, both inclusive, against the company, and the object of the motion is that the register of members of the company may be rectified by removing therefrom the names of those shareholders. The

(1) 2 Q. B. D. 26.
(2) [1877] W. N. 223.
(3) 2 Q. B. D. 29.
(4) (1883) 25 Ch. D. 118.

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question arises in this way. [His Lordship stated the facts, and continued :—]

It is suggested that the proceedings of the company were not valid, and that these shares which have been so issued and have been held for the last six years were no shares at all—were not properly issued—and on that ground the plaintiff asks to have the names of the holders of them taken off the register.

The question that I have to determine is whether what the company did was in effect, although not perhaps in terms, within the provisions of the memorandum and articles of association, and, if it was in effect though not in terms, whether there was a sufficient compliance with the memorandum and articles to render the proceedings valid. Perhaps I ought to say that the real question is not so much whether the proceedings were in effect a compliance with the memorandum and articles as whether upon the true construction of the memorandum and articles they were not really and in terms a compliance with them. The question resolves itself into this. On the construction of this particular memorandum and the particular part of it, can there be such a thing as a meeting of one shareholder? It is not a question of there being several shareholders, and one shareholder only attending the so-called meeting, but where there is only one shareholder, so that a meeting in the sense of an assembly of persons is impossible. The object of the provisions in the memorandum is quite plain. It is to obtain, before the issue of new shares, the assent in a binding and formal manner of the person or persons whose rights are affected.

Under article 46 it is clear that if Bennett can constitute "a meeting" there is no difficulty about the quorum, because the quorum in this case is to be the holders of shares present in person (or represented by proxy) holding not less than three fourths of the issued shares of the class. In an ordinary case I think it is quite clear that a meeting must consist of more than one person. That was determined in two cases, *Sharp* v. *Dawes* (1), which came before the Court of Appeal, and *In re*

(1) 2 Q. B. D. 26.

Sanitary Carbon Co. (1), which came before Sir George Jessel M.R. In *Sharp* v. *Dawes* (2) the meeting in question was a meeting of the company. There were several shareholders in the company. A meeting was called for the purpose of making a call. One shareholder only attended the meeting. He held the proxies of other shareholders and he took the chair and passed a resolution making a call, and he proposed a vote of thanks to himself. In giving judgment in the Court of Appeal Lord Coleridge C.J. said: "The word 'meeting' prima facie means a coming together of more than one person. It is, of course, possible to shew that the word 'meeting' has a meaning different from the ordinary meaning, but there is nothing here to shew this to be the case. It appears therefore to me that this call was not made at a meeting of the company within the meaning of the Act"—i.e., the Stannaries Act. In *In re Sanitary Carbon Co.* (1) the meeting again was a meeting of the company. There were several shareholders. A winding-up petition had been presented by a creditor, and it was opposed by the company on the ground that a meeting had been held at which a voluntary liquidation had been resolved upon. There again the meeting consisted of one person only, who had in his pocket the proxies of the only three other shareholders, and that person voted himself into the chair, proposed a resolution to wind up voluntarily, declared the resolution passed, and appointed a liquidator. There again the Master of the Rolls held that there was no meeting.

But now what I have to consider is whether this is not one of the cases referred to by Lord Coleridge C.J. as one in which it may be possible to shew that the word "meeting" has a meaning different from the ordinary meaning. For that purpose I think I am entitled to see what is the object of the provision in the memorandum of association. Plainly, as I have already said, that object is that before affecting the rights of the preference shareholders it shall be necessary to obtain and record in a formal manner the assent of the preference shareholders to that course. I think I may take it also that the persons who framed this document may have had, and must be taken to have had, in

(1) [1877] W. N. 223. (2) 2 Q. B. D. 26, 29.

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their minds the possibility at all events that this particular class of shares might fall into the hands of one person. There is nothing to prevent it in the constitution of the company. One must regard the memorandum as far as possible as providing for circumstances which in the ordinary course may arise. That being so, I think I may very fairly say that where one person only is the holder of all the shares of a particular class, and as that person cannot meet himself, or form a meeting with himself in the ordinary sense, the persons who framed this memorandum having such a position in contemplation must be taken to have used the word "meeting," not in the strict sense in which it is usually used, but as including the case of one single shareholder. There is, of course, no difficulty in treating the formally expressed assent of Bennett as a resolution. The only question is the purely technical difficulty arising from the use of the word "meeting" in the memorandum.

I think on the whole that I may give effect to obvious common sense by holding that in this particular case, where there is only one shareholder of the class, on the true construction of the memorandum, the expression "meeting" may be held to include that case. It seems to me, therefore, that the shares were validly issued, and that there is therefore no necessity for the rectification of the register. I refuse the motion on that ground. I think I had better say, the Court being of opinion that the 10,000 shares in question were validly issued, no order on the motion.

Solicitors: *Robbins & Co.; Robbins & Co., for Abbot, Pope, Brown & Abbot, Bristol.*

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Nov. 24, 26, 29.

In re COAKS.
COAKS *v.* BAYLEY.

[1910 C. 2858.]

Tenant for Life and Remainderman—Will—Settled Mortgages—Arrears of Interest at Testator's Death—Receipt of Rents of Mortgaged Properties by Trustees—Deficient Security—Apportionment of Rents as between Capital and Income.

A testator gave his residuary real and personal estate to trustees upon trust to sell, with power to postpone, and to divide into shares, each share being settled. The testator's assets included several mortgage debts the interest on which was in arrear at his death. The testator had entered into and remained in receipt of the rents of the mortgaged properties up to his death, and the trustees had continued in such receipt. The securities being deficient, the question arose between the tenants for life and the remaindermen as to the application of these rents:—

Held, that the trustees must first apply each instalment of rent received since the testator's death from each mortgaged property in satisfaction of the arrears of interest which at the testator's death were due in respect of the mortgage, and then distribute the balance as income up to but not exceeding the interest accrued since the testator's death on the mortgage, and apply any excess as capital.

Adjourned Summons.

Isaac Bugg Coaks by his will, dated September 28, 1909, devised and bequeathed the residue of his real and personal estate to his trustees upon trust to sell and convert the same into money with full power at their discretion to postpone or defer such sale and to continue all or any existing investments without being liable for any loss that might arise from their doing so, and he declared that the trustees should stand possessed of his real and personal estate or the proceeds of the sale thereof and all other moneys arising from or forming part of his residuary estate upon trust to divide the same into six equal shares. The testator then proceeded to direct his trustees to stand possessed of five of these shares upon trusts for the respective benefits of his five children and their issue and of the remaining share upon trusts for the benefit of the three children of a deceased child and their respective issues.

The testator died on December 30, 1909.

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COAKS, *In re.* COAKS v. BAYLEY.

Part of the estate of the testator consisted of mortgage debts secured by mortgages on freehold, copyhold, and leasehold properties, the interest on which was considerably in arrear at his death. The testator had entered into and remained in receipt of the rents of the mortgaged properties up to the time of his death, and the trustees had since continued in such receipt. The securities were in each case deficient.

This was a summons taken out by the trustees for the determination of the question (inter alia) whether under these circumstances any and what part of the rents received from the mortgaged properties since the testator's death ought to be distributed as income.

Cave, K.C., and *A. C. Nesbitt*, for the summons.

Clauson, K.C., and *H. M. Broughton*, for tenants for life. The tenants for life are, it is submitted, entitled to the full rents of the mortgaged properties accruing since the testator's death up to an amount not exceeding the amount of the interest on the mortgages: *In re Atkinson* (1); *In re Broadwood's Settlements.* (2)

[WARRINGTON J. Ought not the trustees to adopt the usual rule which obtains as between mortgagee and mortgagor of attributing the receipts of rent to the earliest arrears of interest?]

Notwithstanding that the securities are deficient the tenants for life are entitled to receive the whole of the interest on the mortgages.

On the construction of the will it is submitted that what the testator has given to the tenants for life is the income of the mortgaged properties as they existed at his death.

T. H. Carson, K.C., and *F. A. Milne*, for infants interested in the capital. We say that the accruing rents of each mortgaged property should be applied in the first place in satisfaction of the interest on that mortgage which was in arrear at the testator's death. Subject to that they should go to the tenants for life up to but not exceeding the amount of the interest accruing since the death. The excess, if any, should be applied as capital.

(1) [1904] 2 Ch. 160. (2) [1908] 1 Ch. 115.

What the testator has given by his will are mortgage debts, not mortgaged properties.

A. L. Ingpen and *G. M. Hildyard*, for other parties.

WARRINGTON J. The question is how as between income and capital the trustees ought to deal with the rents received from certain mortgaged properties of which they are now in possession.

The testator by his will gave all the rest and residue of his real and personal estate to his trustees upon trust to sell and convert, with power to postpone, and then in effect he gave the income of the real and personal estate to certain persons for life, and after their deaths the capital to other persons. At the death of the testator the interest on the mortgages was in arrear and was therefore a debt due to him from the mortgagors. Since his death interest has continued to accrue and future interest will become due. The arrears of interest at the death in fact represented a debt due to the testator, and this was given to the trustees as part of the capital of the estate. It was their duty to get in that debt. Before and at the time of his death the testator was in possession of the mortgaged properties, and since his death the trustees have continued in such possession and they have received from the mortgaged properties certain sums of money properly applicable as between mortgagor and mortgagee to discharging the arrears of interest. It seems to me, therefore, that the trustees in pursuance of their duty ought to apply that money in the first place in satisfaction of the debt represented by the interest in arrear at the death.

I think the answer to the question is that the rents from the mortgaged properties ought to be applied first in the discharge of the interest due to the testator at his death, and subject thereto the rents ought to be applied in payment to the tenants for life of sums not exceeding the interest on the mortgages, and any excess ought to be applied as capital. (1)

Solicitors for all parties: *Master, Hussey & Master, for Rackham & Sayer, Norwich.*

(1) Cf. *In re Godden*, [1893] 1 Ch. 292.

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NEVILLE J.

1910

Nov. 23, 24, 30.

In re COOMBER.

COOMBER *v.* COOMBER.

[1908 C. 3859.]

Fiduciary Relation—Gift—Influence—Dual Relation—Son who was also in Fiduciary Relation to Mother—Gift by Mother—Gift induced by Natural Affection—Independent Advice.

Where a gift is made to a person standing in a fiduciary relation to the donor, and also in another relation such that the gift may be explained by natural affection, the Court will uphold the gift without evidence of independent advice if satisfied that it was in fact induced only by affection.

Arthur Benjamin Coomber, who died on July 14, 1905, was at the date of his death possessed of a long lease of the Old Burton Ale Stores, York Road, Battersea, and carried on there the business of a retailer of beer. His son Harry Coomber had for many years assisted his father in the business and for some years before his father's death had acted as sole manager of the business. He had never received any regular remuneration, but had lived with his father and been supplied irregularly with pocket money. There was some evidence that A. B. Coomber had expressed a wish that Harry Coomber should have the business, but by his will he gave all his property to his wife, S. A. Coomber, absolutely.

On September 28, 1905, Mrs. S. A. Coomber executed an absolute assignment of the lease of the said ale stores to Harry Coomber for his own use, and on the next day the licence for selling beer on these premises was assigned to him. There was no consideration for this assignment expressed in the deed, except the usual covenant to pay the rent and perform the covenants contained in the lease. But the judge found as the result of the evidence that Harry Coomber agreed to let his mother have 3*l.* a week out of the business in addition to the rents of certain houses which had belonged to his father, and which he collected as her agent, amounting to 3*l.* a week (making 6*l.* in all), and that this sum was regularly paid during her life. He also found that Mrs. Coomber made the assignment in the

belief that she was thereby carrying out the intention of her husband. The assignment was prepared by a solicitor, who had acted for Mrs. Coomber in relation to her husband's estate, upon instructions which she gave him at an interview to which he had come at her request, and at which they were alone. He explained the draft assignment to her, and saw that she knew and understood what she was doing, but he was not asked to give, and did not give, her any advice.

Mrs. Coomber died on July 23, 1906, leaving three children, namely, the plaintiff, her eldest son, Harry Coomber, and a daughter. By her will, dated February 15, 1906, she gave a legacy of 600*l.* to the plaintiff, certain leasehold houses to her daughter, and the residue of her estate to her three children in equal shares.

This action was brought by the plaintiff against Harry Coomber and his sister as defendants, claiming a declaration that Harry Coomber was a trustee of the lease and the licence for the persons interested in Mrs. Coomber's residuary estate. He alleged that the assignment was void upon several grounds which failed, but the only point which seems to need a report was the question whether the assignment was void on the ground that Harry Coomber was in a fiduciary relation to his mother, and that she had no independent advice.

Peterson, *K.C.*, and *Boome*, for the plaintiff. The defendant Harry Coomber was in a fiduciary relation to his mother as her agent in the management of the business; he cannot maintain the gift from her unless he proves that she had independent advice. There is no need for the plaintiff to prove undue influence; when a fiduciary relation is once established the burden of proof is on the donee—*Rhodes* v. *Bate* (1)—and Harry Coomber has not discharged that burden.

Butcher, *K.C.*, and *Cozens-Hardy*, for the defendant. The rule as to fiduciary relation is that a person must not take advantage of that relation to obtain a gift or other benefit: *Hunter* v. *Atkins*. (2) He must satisfy the Court that no such advantage was taken, but if this is shewn, there is no reason why

(1) (1865) L. R. 1 Ch. 252. (2) (1832) 3 My. & K. 113.

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another relation, existing at the same time, such as the parental relation, should not have its natural effect. This was a quite ordinary gift to a son, and it is not void because the son was also an agent. There does not seem to be a decided case where there has been a dual relation as here. But the only relation which will prevent the validity of a gift is one where the donee has influence. A mere relation of affection or parental relation is not enough: *Beanland* v. *Bradley* (1); *Taylor* v. *Johnston.* (2) On the facts in this case the mother was plainly influenced by affection and a wish to carry out her husband's wishes, not by the fact that her son was her agent in the business.

Peterson, K.C., in reply. The question really is whether Mrs. Coomber if she were alive would be bound by this gift. In *Allcard* v. *Skinner* (3) Lindley L.J. divides the cases into two classes, the one where there has been something like fraud and undue influence, the other where the confidential relation of the parties is such that the Court throws upon the donee the burden of shewing that the donor had independent advice which prevented the influence of the confidential relation. This case comes within the latter class: *Rhodes* v. *Bate.* (4) The mere fact that the mother employed her own solicitor is not enough: *Powell* v. *Powell* (5); *Wright* v. *Carter.* (6) It must be shewn that he advised her fully. In this case it is clear that he did not.

NEVILLE J. There does not appear to me to be any serious conflict of testimony upon the facts of this case so far as they are material. The defendant Harry Coomber assisted his father in his business at the Old Burton Ale Stores from the year 1897 until the father's death in July, 1905. The father had expressed a wish that his son Harry should have the business, but by his will he left everything to his wife absolutely. If the evidence of what the father had said on the subject stood alone, it is not clear that he intended the destination of the business to disturb equality of partition amongst his children. He was, however, on the closest terms of affection with his wife to the last, and she

(1) (1854) 2 Sm. & G. 339.
(2) (1882) 19 Ch. D. 603.
(3) (1887) 36 Ch. D. 145, 181.
(4) L. R. 1 Ch. 252.
(5) [1900] 1 Ch. 243.
(6) [1903] 1 Ch. 27.

was the person most likely to know his real intention with regard to the business, and she declared that what she subsequently did was in accordance with his wishes. It was after the death of the father intended to transfer the licence into the name of Harry Coomber, and whether anything, or what, was said about the assignment of the lease in this connection is in dispute: in the light of subsequent events it does not seem to me to be material. The defendant says that his mother told him she was going to make over the house to him in accordance with his father's wishes, and that he thereupon promised to pay her 3*l.* a week on account of the business, making with the rents he collected for her about 6*l.* in all. This 3*l.* was I think fixed, without reference to the value of the business, to meet the mother's requirements beyond the amount of the rents received, for the son told his mother that if at the end of a year she found she wanted more he would let her have it. Harry Coomber was at the same time asked by his mother to request Mr. Berney, a solicitor who had acted for her in the matters arising under her husband's will, to call upon her. Mr. Berney saw her on September 25 and took her instructions to prepare an assignment of the lease by way of free gift to her son, and at the same time took certain instructions for the preparation of her will. Mr. Berney was not asked to give and did not give any advice in the matter, but was careful to ascertain that Mrs. Coomber knew what she was about and realized what the consequences of carrying out her instructions would be. He says she was somewhat agitated, but quite competent to give the instructions which she did. I accept his evidence on this point. On September 28 Mr. Berney's clerk brought her the assignment which she executed in the presence of her daughter. She never told the plaintiff, her eldest son, or his wife, what she had done, and Harry Coomber concealed it from his brother until after his mother's death. Harry Coomber had continued to carry on the business after his father's death, and had made some payments to his mother on account before September 25. After the assignment he paid her 6*l.* a week until her death in July, 1906. These are the material facts, I think, and upon them the original case made by the plaintiff in his pleadings, as well as that made by amendment at the trial, entirely fails, but

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in the opening another point was taken, and it is this. Having regard to Harry Coomber's position in the business after his father's death he was in a fiduciary position with regard to his mother and is bound, in order to support the gift, to shew that his mother had independent advice in the matter. If this is the true view, the gift fails, and the plaintiff must succeed, for Mrs. Coomber got no advice in the matter at all. On the other hand, if Harry Coomber had not been carrying on the business for his mother, I think the plaintiff could not succeed without evidence of undue influence, of which there is none. Harry Coomber was, however, in the position of agent for his mother in carrying on the business before assignment.

I think, therefore, that the burden of proof is upon him to rebut the presumption that the gift was induced by that relation. He has failed to discharge that burden by shewing that his mother was independently advised. Can it be done in any other manner? I think it can. I think the evidence shews clearly that the gift by Mrs. Coomber was not due to any relation which the carrying on of the business by Harry Coomber after his father's death had established between him and his mother. I think it was wholly independent of any such position, and that Mrs. Coomber was induced to make the gift out of affection for her son and because she believed she was thereby giving effect to her late husband's wishes. Under these circumstances it appears to me that it would be irrational to hold that the rights of the parties were governed at the time of the assignment by a relationship which in fact did not induce the transaction.

I do not think the questions of the title to the loose chattels or to the profits of the business prior to the date of the assignment form any part of the subject-matter of the action, and I think the claim in the action fails on all three grounds and must be dismissed with costs.

Solicitors: *Thomas Durant ; Corsellis & Berney.*

J. R. B.

In re HOYLES.
ROW *v.* JAGG.

[1907 H. 1645.]

C. A.
1910
Nov. 18;
Dec. 7.

Conflict of Laws—Mortmain—Charitable Bequest — Colonial Mortgages — Movables or Immovables— Lex Domicilii—Lex rei sitæ — Adoption of English Law by Colony—Mortmain Act, 1736 (9 *Geo.* 2, *c.* 36).

A mortgage on land is an immovable.

Therefore where a domiciled Englishman, who died before the repeal of the Mortmain Act, 1736, by his will gave to charity his residuary estate, which included mortgages on land in Ontario, and at the date of his death the law was the same in Ontario as in England:—

Held, that the gift of the mortgages was void.

Per Farwell L.J.: The division of property into movable and immovable is only called into operation when the English Courts have to determine rights between a domiciled Englishman and a person domiciled in a country which does not adopt the English division of property into real and personal; it does not apply where the law is the same in the two countries.

Appeal from a decision of Swinfen Eady J. (1)

By his will, dated June 25, 1878, a testator gave his personal and real property to his wife for life, and on her death he gave one third of it to charity. The testator died on February 22, 1888, domiciled in England. The wife died on December 4, 1906. By an order of June 3, 1908, made upon a summons to determine whether the charitable gift was void to any and what extent under the Mortmain Act, 1736 (9 Geo. 2, c. 36), which was in force at the testator's death, an inquiry was directed as to what part of the one third share was at the testator's death attributable to pure personalty and what to impure personalty. By his certificate dated March 23, 1910, the Master certified (inter alia) that $16,340 invested on five legal mortgages of freehold land in the city of Toronto, in the Province of Ontario, Canada, and worth 3348*l.* at the testator's death, was attributable to impure personalty. The mortgages contained covenants to pay the moneys secured.

(1) [1910] 2 Ch. 333.

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On March 30, 1910, the Attorney-General issued a summons to vary this finding and to have it determined that the mortgage moneys were pure personalty within the English Mortmain Act, 1736.

It was established by the evidence of Canadian counsel that the laws of England, including the Mortmain Act, 1736, and the decisions thereon were introduced into Upper Canada by the 32 Geo. 3, c. 1, which provided that "in all matters of controversy relative to property and civil rights resort should be had to the laws of England as the rule for the decision of the same," so that in matters not depending on provincial statutes or peculiar conditions or circumstances to which the common law or Imperial statutes could not be applied the law of England was resorted to when any controversy arose. At the time of the testator's death the mortmain laws of England and Upper Canada were identical. Each law had a purely local operation, and by each law local mortgages were impure personalty, and bequests thereof to charity by persons domiciled in the locality invalid. The personal representative could assign or release a mortgage on payment. No case had arisen in which the Ontario Courts had had to determine whether, if a testator domiciled in England bequeathed mortgages of freehold land in Ontario to a charity in England, the Ontario Courts would hold that the provincial statute applied to that bequest, but if a decision were called for in Ontario, it would be based upon what would be decided on the same point in England.

Swinfen Eady J. held that a bequest by a person domiciled here of mortgages in fee on land in Ontario was invalid, and he dismissed the summons to vary.

The Attorney-General appealed.

Sir Rufus Isaacs, *A.-G.*, and *Sargant*, for the appellant. The question of the validity of this bequest depends primarily on the question whether these Ontario mortgages are movables or immovables. If they are movables, the question of the validity of the gift is governed by the law of the testator's domicil; if they are immovables, by the law of the situs. The question whether they are movables or immovables must be decided according to

the law of Ontario: *Jerningham* v. *Herbert* (1); *Freke* v. *Carbery* (2); *In re Fitzgerald* (3); Westlake's Private International Law, 4th ed. s. 160. That question has never been decided in Ontario, but it appears that the Ontario Courts would follow the decision of the English Courts upon the same question in respect to a mortgage debt secured on English land. That question must be decided independently of any Mortmain Act in force for the time being. The Mortmain Act is subject to the jus gentium, which is the law of domicil as to movables and the law of the situs as to immovables and has a local operation only; and until the broad question of the character of the property is decided it does not apply: *Canterbury Corporation* v. *Wyburn*. (4)

It is conceded that by the law of England a devise of land to charity anywhere outside England and Wales is perfectly good. Therefore the Master was bound to find that these mortgages were not impure personalty, which is a creation of the Mortmain Act only. Assuming that these mortgages are immovables in Ontario, it is true that the law of Ontario forbids gifts of immovables to charity, but whether they are or are not immovables by the law of Ontario is a question of fact. The evidence, however, shews that the law of property in Ontario is the same as the law of England, and that a mortgage debt secured on land in Ontario stands on the same footing by the law of Ontario as a mortgage debt secured on land in England stands by the law of England. Therefore the question resolves itself into the question whether a mortgage debt secured on land in England is a movable or an immovable. It is a mere accident that the laws of the two countries are the same, and the question may be best tested by supposing a gift of residue under the will of a domiciled Frenchman comprising mortgage debts secured on land in England. Are those mortgage debts movable or immovable, apart from any question under the Mortmain Act? As a debt, a mortgage debt secured on land is clearly personal; as a charge on the land, it clearly savours of realty, and the question is which of these two characteristics ought to prevail. That depends on whether the debt or the charge is the principal characteristic. A mortgage

(1) (1828) 4 Russ. 388.
(2) (1873) L. R. 16 Eq. 461.
(3) [1904] 1 Ch. 573.
(4) [1895] A. C. 89.

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though in form a conveyance of land has always been treated as personal property, and it is submitted that the debt and not the security is the principal characteristic and determines the character of the property.

[FARWELL L.J. Mr. Dicey in his Conflict of Laws, 2nd ed. p. 76, says "Immovable property includes all rights over things which cannot be moved, whatever be the nature of such rights or interests."]

At p. 310 he says in the footnote, quoting Hanson, "The locality of a mortgage debt is regulated by the same rules that apply to other debts, and in no way depends on the situation of the property comprised therein"; and in *Lawson* v. *Commissioners of Inland Revenue* (1) it was held by the Court of Exchequer in Ireland that a mortgage held by an Irish testatrix on foreign land was a movable.

[FARWELL L.J. That may be so for some purposes, but revenue cases have much less reference to actual facts than to the exigencies of the Treasury.]

In *Martin* v. *Mowlin* (2), which was not a revenue case, Lord Mansfield, delivering the judgment of the Court of King's Bench, came to the same conclusion. The result is that this residuary gift is good as to the mortgages in Ontario.

Hon. E. C. Macnaghten, K.C., and *W. M. Cann*, for the respondents, the next of kin. The gift of these mortgages is in fact a gift of land. The right of the mortgagee on the failure of the mortgagor to pay is to foreclose; the mortgagee has the legal estate; the mortgagor has nothing but a right of redemption: *Attorney-General* v. *Meyrick*. (3) Immovables include not only lands, but servitudes and easements and mortgages: Story on the Conflict of Laws, 8th ed. s. 447. In determining this question regard must be had to the policy and effect of the Mortmain Act. The respondents rely on the reasoning of Swinfen Eady J.

Sargant in reply. The Mortmain Act did not alter the character of the property. The mortgagor is in equity looked upon as the owner of the land; all the incidents of personalty

(1) [1896] 2 I. R. 418; [1896] W. N. 145.

(2) (1760) 2 Burr. 969.

(3) (1750) 2 Ves. Sen. 44.

attach to the mortgage debt, and all the incidents of realty attach to the equity of redemption.

Cur. adv. vult.

Dec. 7. COZENS-HARDY M.R. This appeal raises a curious point. By the law of England in force at the date of the testator's death a domiciled Englishman could not by will bequeath a mortgage of land in England for the benefit of a charity. By the law of Ontario in force at the same date a domiciled Canadian could not by will bequeath a mortgage of land in Ontario for the benefit of a charity. The law of England was identical with the law of Ontario in this respect. But it is argued that a domiciled Englishman can by will bequeath a mortgage of land in Ontario for the benefit of a charity. Swinfen Eady J. has declined to accept this view, and in my opinion his decision is right.

It is contended that the validity of a testamentary disposition of movables depends upon the law of the testator's domicil, and that the Mortmain Act, 1736, is purely local and does not extend to foreign land or money savouring of foreign land, and that an Ontario mortgage is a movable, the debt being the principal thing and the security only an accessory. The terms "movable" and "immovable" are not technical terms in English law, though they are often used, and conveniently used, in considering questions arising between our law and foreign systems which differ from our law. But where the two systems are identical, as in the present case, I doubt whether the terms are appropriate. Putting aside this doubt, I think a mortgage debt secured by land is to be regarded, not as a movable, but as an immovable. The authority of text-writers is strongly in favour of this view. Story, s. 447, expressly includes "charges on lands, as mortgages," as in the sense of the law immovables and governed by the lex rei sitæ; and Dicey states that "immovable property includes all rights over things which cannot be moved, whatever be the nature of such rights or interests" (Dicey, 2nd ed. p. 76; see also p. 496). Thus a Scotch heritable bond has always been treated by our law as immovable, although there is a personal obligation to pay:

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Jerningham v. *Herbert* (1); *In re Fitzgerald.* (2) But apart from authority, I should have arrived at the same conclusion from considering the nature and extent of the rights of a mortgagee of freehold land. If he sues on the covenant to pay he must reconvey the land on payment. If he has parted with the land, otherwise than in exercise of a power of sale, he would be restrained from suing on the covenant: *Lockhart* v. *Hardy* (3); *Palmer* v. *Hendrie* (4); *Kinnaird* v. *Trollope.* (5) The result is that a mortgagee cannot assign the mortgage debt effectually without also transferring the security upon the land. This ground is sufficient for disposing of the present appeal, for it is conceded that if the Ontario mortgage is to be regarded as an immovable, to which the law of Ontario applies just as much as to land in Ontario, the lex loci must prevail, and that lex loci does not allow a mortgage to be bequeathed to a charity.

Although it is not necessary for my decision, I wish to add that there is great force in the argument founded on the policy of the Mortmain Act, 1736, and that I should hesitate before holding that a domiciled foreigner could bequeath mortgages of land in England, though a domiciled Englishman could not do so.

The appeal must be dismissed with costs.

FLETCHER MOULTON L.J. I do not dissent from the judgment that has just been delivered, but I cannot say that I feel the same confidence in the conclusion as my brethren feel, and some of the difficulties and some of the points of law up till now unsettled press me more than they do them. But it is a point that ought to be authoritatively settled one way, and as I am not prepared to dissent I do not feel it would be of any service to explain in detail the nature of my doubts.

FARWELL L.J. I am of opinion that Swinfen Eady J.'s judgment is quite right.

At the date of the death of the testator the laws of England and of Ontario were the same, and the Statute of Mortmain

(1) 4 Russ. 388.
(2) [1904] 1 Ch. 573, 588.
(3) (1846) 9 Beav. 349.
(4) (1859) 27 Beav. 349; (1860) 28 Beav. 341.
(5) (1888) 39 Ch. D. 636.

of George II. applied in Ontario as it then did in England. If a testator domiciled in England had devised to a charity a mortgage of real estate in England, it would have been void under the statute, and if a testator domiciled in Ontario had devised to a charity a mortgage of real estate in Ontario, that devise also would have been void under the statute. But it is argued that if a testator domiciled in England devises to a charity a mortgage on land in Ontario, or a testator domiciled in Ontario devises to a charity a mortgage on land in England, the statute has no application in either case. It is sought to establish this amazing proposition by an argument founded on the division of property in certain cases into movable and immovable. But this division is no part of the law either of England or of Ontario; in both England and Ontario the division is into real and personal property. The division into movable and immovable is only called into operation here when the English Courts have to determine rights between domiciled Englishmen and persons domiciled in countries which do not adopt our division into real and personal property. In such cases, out of international comity and in order to arrive at a common basis on which to determine questions between the inhabitants of two countries living under different systems of jurisprudence, our Courts recognize and act on a division otherwise unknown to our law into movable and immovable. But when there is no such difficulty there is no ground for attempting any such division. In this case the law is the same in both countries; the mortgaged property savours of the realty in both countries; the Statute of Mortmain applies in both countries; and any argument founded on what would be the case if the law of Ontario required us to consider movables and immovables is merely hypothetical and has no application to the present case. There is no necessity for ascertaining which law is applicable because the law in both countries is the same.

But even if this were not so, and the case were that put by Mr. Sargant of a domiciled Frenchman, I should come to the same conclusion. International law is a matter of international comity. No country can be expected to allow questions affecting

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its own land, or the extent and nature of the interests in its own land which should be regarded as immovable, to be determined otherwise than by its own Courts in accordance with its own interests. The question is dealt with by Porter J., cited in Story on the Conflict of Laws, s. 28. He says: "The comity of nations . . . . is, and ever must be, uncertain; . . it must necessarily depend on a variety of circumstances which cannot be reduced to any certain rule; . . no nation will suffer the laws of another to interfere with her own to the injury of her citizens; . . whether they do or not must depend on the condition of the country in which the foreign law is sought to be enforced, the particular nature of her legislation, her policy, and the character of her institutions; . . in the conflict of laws it must often be a matter of doubt which should prevail; and . . whenever a doubt does exist, the Court, which decides, will prefer the laws of its own country to that of the stranger." And at s. 447 the author himself deals with the same question thus: "Here, as we have already seen, not only lands and houses, but servitudes and easements, and other charges on lands, as mortgages and rents, and trust estates, are deemed to be, in the sense of law, immovables, and governed by the *lex rei sitæ*. But in addition to these, which may be deemed universally to partake of the nature of immovables, or (as the common law phrase is) to savor of the realty, all other things, though movable in their nature, which by the local law are deemed immovables, are in like manner, governed by the local law. For every nation having authority to prescribe rules for the disposition and arrangement of all the property within its own territory, may impress upon it any character which it shall choose; and no other nation can impugn or vary that character. So that the question, in all these cases, is not so much what are or ought to be deemed, *ex sua natura*, movables or not, as what are deemed so by the law of the place where they are situated. If they are there deemed part of the land, or annexed (as the common law would say) to the soil or freehold, they must be so treated in every place in which any controversy shall arise respecting their nature and character." If, therefore, we are called upon to decide whether a mortgage on land in England is movable or immovable I have no

hesitation in following Story J. and in deciding that it is immovable. It is true that a mortgage is as between mortgagor and mortgagee regarded as personal estate for many purposes: see *Casborne* v. *Scarfe* (1) and *Fairclough* v. *Marshall* (2); but the fact that it is so for certain purposes in questions between our fellow subjects here has no bearing on the question whether such a mortgage should be regarded as movable or not in questions of international law. The mortgage undoubtedly affects the land directly; the mortgagee can enter and take possession at any time after his estate has become absolute at law; he can by foreclosure acquire the full title to the land in fee, and the Legislature has forbidden any devises of land for any estate or interest whatsoever in any way charged or incumbered by any person or persons whatsoever in trust or for the benefit of any charitable use whatsoever and has made them void: 9 Geo. 2, c. 36, ss. 1 and 2. And the reason is stated in the preamble: "Whereas gifts or alienations of lands, tenements or hereditaments, in mortmain, are prohibited or restrained by Magna Charta, and divers other wholesome laws, as prejudicial to and against the common utility; nevertheless this public mischief has of late greatly increased by many large and improvident alienations or dispositions made by languishing or dying persons, or by other persons, to uses called charitable uses, to take place after their deaths, to the disherison of their lawful heirs." It is for this Court to determine whether mortgages on land are movables or immovables, and in order to come to a conclusion we are bound to consider the result of our decision on the general welfare of this country as shewn by our laws, and if a decision in one way will involve results which our law considers prejudicial to the public interest, or immoral, or the like, it is our duty to decide the other way. Mr. Sargant invites us to leave the Mortmain Act out of sight and decide as a preliminary abstract question whether mortgages on land are movable or immovable. But we should fail in our duty if we did not consider that Act and the effect of our decision upon devises within it. We must have regard to the fact that such gifts have been regarded as prejudicial to and against the public utility and

(1) (1737) 1 Atk. 603. (2) (1878) 4 Ex. D. 37.

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a public mischief, and we must accordingly come to such conclusion as will avoid these evils.

Solicitors: *Treasury Solicitor; Charles Sawbridge & Son.*

H. B. H.

JOYCE J. 1910 *Nov.* 3, 4.

PORTE *v.* WILLIAMS.

[1910 P. 122.]

Estate Duty — Incidence — Will — Power of Appointment — Non-exercise — "Testamentary Expenses" — Direction to pay — Estate Duty on unappointed Property — Charge on Property — Repayment to Executor — Finance Act, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 6, *sub-s.* 2; *s.* 8, *sub-s.* 3; *s.* 9, *sub-ss.* 1, 4.

A testatrix, who, under her husband's will, had a life estate in and a general power of appointment over his residuary estate, by her will recited the power, and that she did not desire to exercise it, but desired that the trusts of her husband's will should upon her death take effect. She then gave all her real and personal estate (exclusive of any which should remain subject to the trusts of her husband's will) to her trustees in trust for conversion, and out of the proceeds thereof to pay her funeral and testamentary expenses, and subject thereto in trust for her daughter for life and after her death as she should appoint. On the death of the testatrix her executors paid the estate duty in respect of the value at her death of her husband's residuary estate:—

Held, that the testatrix's "testamentary expenses" did not include the estate duty in respect of the unappointed property of her husband, and that her executors were entitled to recover the amount of the duty so paid by them from the trustees of her husband's will.

In re Clemow, [1900] 2 Ch. 182, considered.

HENRY MCLAUCHLAN BACKLER by his will, dated February 13, 1891, after appointing his wife, Eliza Backler, his daughter Laura Louisa Backler, J. B. Gill, and the defendant Williams to be his executors and trustees and making certain specific bequests to his wife, gave his residuary real and personal estate to his trustees upon trust for such person or persons as his wife, Eliza Backler, should by deed or will appoint, and until such appointment and so far as the same might not extend to pay the income thereof to his said wife, and after her death, in default of any such appointment by her, he directed his trustees

to hold any part of his estate not received by her upon trust, after paying certain legacies and annuities, to pay the income thereof to his daughter Laura Louisa Backler for life, and after her death then for her children, and in default of such children the testator gave other legacies and appointed his niece Eleanor Beaumont his residuary legatee.

The testator died on November 30, 1892.

J. B. Gill died in 1900, and the defendant Gardiner was appointed a trustee of the testator's will in his place.

Eliza Backler by her will, dated November 19, 1902, after appointing her daughter Laura Louisa Backler and the plaintiff and the defendant Williams executors and trustees thereof and making certain specific and pecuniary bequests, recited as follows: "And whereas under the will of my late husband he after certain absolute bequests to me gave me a power of appointment over the residue of his estate and in default of my exercising the same he gave devised and bequeathed the same upon the trusts in his said will mentioned and whereas I do not desire to exercise the said power of appointment but desire that the trusts contained in his said will save as next hereinafter mentioned should upon my death take effect." The testatrix then directed and appointed that a certain legacy of 200*l.* bequeathed under the will of her said husband should not fail in consequence of the legatee's death in her lifetime, but should be payable to his legal personal representatives; and she further directed and appointed that two legacies of 100*l.* each should in certain events on her death be paid out of her said husband's estate. She gave all her real and personal estate not thereby otherwise disposed of (exclusive of any which should remain subject to the trusts declared by her husband's will) to her trustees upon trust for conversion and out of the proceeds and her ready money to pay her funeral and testamentary expenses and debts and the legacies bequeathed by her will or any codicil thereto, and to invest the residue and to pay the income thereof to her daughter Laura Louisa Backler during her life and after her death in trust for such person or persons as her said daughter should appoint.

The testatrix died on December 16, 1903.

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In May, 1904, a claim was made against the executors of the testatrix for payment of estate duty in respect of the value at her death of her husband's estate as well such part of it as she had appointed by her will as also the part thereof over which she had not exercised the power of appointment.

Laura Louisa Backler died on September 8, 1909, leaving the plaintiff and the defendant Williams the surviving executors of the will of the testatrix and the defendant Williams the sole surviving executor of the testator.

The executors of the testatrix having paid the said duty, this action was brought by the plaintiff against the defendants Williams and Gardiner for (1.) a declaration that so much of the estate duty which upon the death of the testatrix became payable in respect of the residuary estate of the testator existing at the death of the testatrix as was payable in respect of that part of the said residuary estate which was not appointed by the testatrix was a charge upon and payable out of the estate of the testator; and (2.) payment by the defendants to the plaintiff of the amount of estate duty which was payable in respect of the unappointed part of the testator's estate.

Hughes, *K.C.*, and *Sheldon*, for the plaintiff. Having regard to the provisions of the Finance Act, 1894 (1), the estate duty on the husband's estate is a first charge thereon. There may be a question as to whether property appointed under a general power passes to the appointor's executors as such, but it cannot reasonably be suggested that property not appointed does so pass.

(1) Sect. 9 of the Finance Act, 1894 (57 & 58 Vict. c. 30), provides:

"(1.) A rateable part of the estate duty on an estate, in proportion to the value of any property which does not pass to the executor as such, shall be a first charge on the property in respect of which duty is leviable; provided that the property shall not be so chargeable as against a bona fide purchaser for valuable consideration without notice.

"(4.) If the rateable part of the estate duty in respect of any property is paid by the executor, it shall where occasion requires be repaid to him by the trustees or owner of the property, but if the duty is in respect of real property, it may, unless otherwise agreed upon, be repaid by the same instalments and with the same interest as are in this Act mentioned."

Sects. 1, 6, sub-ss. 2, 7; s. 8, sub-s. 3; and s. 22 of the Act were also referred to.

It will be contended that the estate duty on the husband's estate comes within the "testamentary expenses" of the wife which she has directed to be paid out of her estate. But her testamentary expenses are confined to those incidental to the administration of her own estate, and do not extend to duties payable in respect of another estate which the Legislature has said shall in the first place be paid by her executors. Her executors are in this matter in the position of agents for her husband's trustees. *In re Clemow* (1) may be cited against the plaintiff's contention, but that case does not apply here, where the wife's executor has a right to recover from the husband's estate. It would be just as reasonable to contend that if the testatrix were compelled to pay a debt for which she was surety her executor could not recover from the principal as to say that her executor cannot recover this duty on her husband's estate.

In *In re King* (2) it was held that settlement estate duty is not a testamentary expense, although the executor is accountable for it; and that it was therefore payable out of the settled property under the Finance Act, 1896, s. 19, sub-s. 1, notwithstanding a direction in the will to pay testamentary expenses out of residue. Whether this duty is a testamentary expense or not, the plaintiff is entitled as the testatrix's executor to recover it from her husband's estate on which it is charged.

Austen-Cartmell (*Younger, K.C.*, with him), for the defendants. The direction in Mrs. Backler's will to pay her testamentary expenses throws the burden of this duty upon all the personal estate of which she had power to dispose: Finance Act, 1894, s. 6, sub-s. 2; s. 8, sub-s. 3.

I admit that in the absence of that direction her executors would have been entitled to repayment of the duty under s. 9, sub-s. 4; but having regard to that direction the power to recover the duty is taken away. It throws the duty upon her estate. Whatever it is necessary for the executor to pay in order to obtain probate comes under the head of "testamentary expenses": *In re Clemow* (1); *In re Treasure.* (3) Mrs. Backler's

(1) [1900] 2 Ch. 182. (2) [1904] 1 Ch. 363.
(3) [1900] 2 Ch. 648.

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executor is accountable for the duty, and he pays it in his executorial capacity. If she had appointed the fund no difficulty would have arisen. If she had released the power the duty would not have fallen on her estate. The fund did not pass on the death of the husband; the estate therefore in respect of which the duty is payable is the wife's estate, and it is payable out of that estate.

The direction to pay testamentary expenses constitutes a bequest of the amount of the estate duty to the persons who take the unappointed property. [He also referred to *In re Sharman* (1), *In re King* (2), *In re Dixon* (3), *In re Jolley* (4), *In re Leveridge* (5), and *In re Pimm.* (6)]

No reply was called for.

JOYCE J. In this case my attention has been called to certain sections of the Finance Act of 1894. It is very properly admitted by Mr. Austen-Cartmell that, in the absence of any express direction in the will of Mrs. Backler to pay her testamentary expenses, the estate duty in respect of the fund which Mrs. Backler had power to appoint, but which power she did not exercise, on the death of Mrs. Backler was payable out of the unappointed fund and not out of her estate. From that admission it also follows that the case would have been the same if Mrs. Backler had died intestate, although administration to her estate could not have been obtained without payment of the duty in question. The case of *In re Clemow* (7) has been cited to me. It is said that *In re Clemow* (7) decides that "The expression 'testamentary expenses' includes the estate duty in respect of the personal property of which the testator or other person whose 'testamentary expenses' are referred to was competent to dispose at his death," the words "was competent to dispose" being taken from the Act. In my opinion *In re Clemow* (7) decides nothing of the kind. What *In re Clemow* (7) decides is perhaps not very material, but it does not decide that. Here the testatrix, Mrs.

(1) [1901] 2 Ch. 280.
(2) [1904] 1 Ch. 363.
(3) [1902] 1 Ch. 248.
(4) (1901) 17 Times L. R. 244.
(5) [1901] 2 Ch. 830.
(6) [1904] 2 Ch. 345.
(7) [1900] 2 Ch. 182.

Backler, has only exercised to a very small and partial extent the general power which she had. What I am asked to decide is (treating the power as unexercised) that the expression "my testamentary expenses" in Mrs. Backler's will, when she is dealing with her own estate, includes the estate duty in respect of the fund which she had power to appoint, but which power she expressly declined to exercise. As I said in the course of the argument, to my mind it is incredible that any testator or draftsman by using such words could have intended that there should be any such result, and whatever may be the operation, or the extent of the operation, of a provision as to the payment of testamentary expenses when the testator or testatrix had a general power of appointment and exercised it, it is a very different thing to say that such a provision with respect to "testamentary expenses" where the power is not exercised operates so as to provide for the payment of the estate duty in respect of the unappointed fund. In my opinion there is no authority for the proposition that where the power is not exercised the term "my testamentary expenses," used as it is here, includes the estate duty in respect of the unappointed fund. I think it would be wrong so to hold, and I do not hesitate to decide the contrary. Further than that, it seems to me that, if Mr. Austen-Cartmell be right and the term "testamentary expenses" does include the estate duty in such a case as this, the duty would have to be paid out of the estate of the lady who had the power to appoint whether she made a will or not and whether the "testamentary expenses" were or were not mentioned in her will. The law provides how the testamentary expenses are to be paid on every estate, and if testamentary expenses do include estate duty in such a case is this, although not a word be said about it in the will, and although the testatrix herself died intestate, it would have to be paid out of her estate. I must declare that the duty in respect of the fund so far as unappointed ought to be paid out of the unappointed fund.

Solicitors: *E. G. & J. W. Chester; Bridgman, Willcocks, Cowland, Hill & Bowman.*

G. A. S.

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[1910 M. 385.]

Trustee—Indemnity—Change of Cestui que Trust — Novation of Right to Indemnity.

Although the assignment by a cestui que trust of his absolute beneficial interest to a new cestui que trust terminates the trust relationship between the trustee and the old cestui que trust, it does not terminate the personal liability of the old cestui que trust to indemnify the trustee against contingent claims that may arise under existing contractual liabilities, and the mere fact that the trustee concurs and takes an indemnity from the new cestui que trust against those liabilities does not in itself amount to novation.

In 1879 two partners in a firm took an onerous lease on behalf of and as trustees for the partnership and entered into joint covenants with the lessors.

On November 15, 1886, all the original partners, including the two trustees, entered into an agreement to transfer the assets and liabilities to a limited company. The company agreed to indemnify them against the partnership liabilities and to take all reasonable steps in their power to bring about a novation to the company of all liabilities of the partnership and a release therefrom of the partnership and the several partners.

On November 27, 1886, one trustee died.

On November 4, 1887, the surviving trustee in pursuance of the agreement assigned the lease to the company on the usual covenant for indemnity. About the same time he also conveyed other freehold and leasehold partnership property to the company in pursuance of the agreement, without reserving any part to cover the indemnity.

On February 18, 1891, the surviving trustee died.

In 1909, the company having made default, the surviving trustee's executors were compelled to pay 587*l.* for arrears of rent, breach of covenants of the lease, and costs :—

Held, that neither the agreement, nor the assignment and conveyances in pursuance thereof, nor the change of the trust relationship thereby effected, amounted to any novation of the surviving trustee's original right to indemnity and contribution against the partners, and his executors were therefore entitled to enforce this right against the partners or their estates.

Jervis v. *Wolferstan*, (1874) L. R. 18 Eq. 18, 24 ; *Fraser* v. *Murdoch*, (1881) 6 App. Cas. 855, 872 ; and *Hardoon* v. *Belilios*, [1901] A. C. 118, 123, applied.

ACTION.

By a lease dated February 12, 1879, and made between certain

lessors of the one part and Octavius Edward Coope and Charles Peter Matthews (trading with others under the style of Ind, Coope & Co., brewers and co-partners) as lessees of the other part, the Swiss Gardens, New Shoreham, Sussex, together with the Swiss Cottage inn, dancing room, tea room, Swiss Cottage theatre, and other erections standing thereon, were demised to the lessees for the term of forty-two years from June 1, 1878, at the rent of 750*l.* payable quarterly and subject to the joint covenants on the part of the lessees therein contained.

This lease was taken by the lessees at the request and as trustees for and on behalf of the partners in Ind, Coope & Co. and in connection with their partnership business.

The names of the partners and their proportionate shares were as follows:—

The lessee Octavius Edward Coope	$\frac{250}{560}$
Edward Ind	$\frac{75}{560}$
The lessee Charles Peter Matthews	$\frac{75}{560}$
Thomas Mashiter	$\frac{75}{560}$
Edward Jesser Coope	$\frac{35}{560}$
Frederick John Nash Ind	$\frac{10}{560}$
Edward Murray Ind	$\frac{10}{560}$
Charles William Matthews... ...	$\frac{10}{560}$
Edward Thomas Helme	$\frac{10}{560}$
Edward Johns Bird...	$\frac{10}{560}$

On November 13, 1886, Ind, Coope & Co., Limited, were incorporated to acquire the business and goodwill of the partnership.

By an agreement dated November 15, 1886, and made between the ten partners thereinafter referred to as the owners of the one part and Ind, Coope & Co., Limited, of the other part, reciting that the owners had lately incorporated themselves as a company limited by shares under the title of Ind, Coope & Co., Limited, and intended that the assets and liabilities of the partnership should be respectively transferred and undertaken and the partnership business carried on by the company, and reciting that the capital of the partnership belonged to the several owners in the shares or proportions shewn in the schedule (being the proportions above stated), it was agreed as follows:—

Clause 1. "All land and buildings of whatever tenure . . . .

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works plant machinery stock in trade . . . . and other chattels . . . . debts . . . . money and securities for money and all choses in action . . . . belonging to the said partnership, and the goodwill of the said business and all other the assets . . . . belonging to the partnership as upon October 2, 1886 . . . . shall upon the execution of this agreement be the absolute property of the company subject nevertheless to any incumbrances affecting the same."

Clause 2 contained an immaterial exception.

Clause 3. "The company shall immediately after the execution hereof allot to each of the several owners the ordinary shares set opposite his name in the third column of the said schedule hereto. All shares to be so allotted are to be issued and held as fully paid up shares." (The allotment was ten ordinary fully-paid 100*l.* shares for each $\frac{1}{560}$th share in the partnership.)

Clause 4. "The company shall undertake pay and perform all the debts liabilities and engagements of whatever nature of the said partnership whether known or not known and if known whether appearing in the books or not and shall satisfy all claims whatever against the partnership and shall save harmless and keep indemnified the owners respectively and their respective estates against all such debts liabilities engagements and claims and will take from time to time all reasonable steps in their power to bring about a novation to the company of all liabilities of the said partnership and a release therefrom of the said partnership and the several owners."

Clause 5. "So much of the property comprised in this agreement as is capable of delivery shall be delivered to the company upon the signing hereof."

Clause 6. "Each of the owners hereby agrees with the company that he will from time to time at the request and cost of the company execute and do every instrument and thing which the company may reasonably require for vesting in the company or as the company may direct any property of the partnership standing in his name or in the name of himself and any other or others and in the meantime will stand possessed of such property upon trust for the company and their assigns to be disposed of as the company or their assigns may direct and for

the purpose of recovering or protecting any property or of asserting any right to which the company may be or become entitled under this agreement or under any instrument executed in pursuance hereof the company may sue in or otherwise use the name of any one or more of the said owners on giving to such owner or owners a proper indemnity against any costs or expense to be incurred by him by reason thereof."

Clause 7. "The several assets of the partnership shall be taken over by the company according to the actual estate and interest therein of the said partnership and the said partnership shall not be deemed as warranting the title to any property of which they may be the ostensible owners or the validity or amount of any debt or the accuracy of their books in relation to any account debt or other matter."

The lessee O. E. Coope died on November 27, 1886. The defendants were his executors.

By an assignment dated November 4, 1887, indorsed on the said lease and made between C. P. Matthews, the surviving lessee, of the one part and the company of the other part, reciting the death of O. E. Coope and reciting that the premises comprised in and demised by the lease were held by the lessees upon trust for and on behalf of the company and the company had requested C. P. Matthews to assign the premises to them, which he had agreed to do, the said C. P. Matthews as trustee assigned the demised premises to the company for all the residue then unexpired of the term created by the lease subject to the rent and the lessees' covenants. The company covenanted to pay the rent and perform the covenants and to "keep the said Charles Peter Matthews and the estate of the said Octavius Edward Coope indemnified" against all liability for non-payment of the rent and breach of the covenants.

The surviving lessee C. P. Matthews died on February 18, 1891. The plaintiffs were his executors.

The company subsequently got into difficulties and failed to pay the rent and perform the covenants, and on June 14, 1909, the Public Trustee, in whom the freehold reversion was vested, sued the plaintiffs as executors of C. P. Matthews, the surviving lessee, for arrears of rent and damages for breach of covenant.

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The executors having no defence to the action, or to claims for future rent, the action was settled on January 31, 1910, the executors paying 5750*l.* in full satisfaction of all claims and paying 124*l.* for costs and surrendering the lease, and the Public Trustee releasing them from further liability. It was admitted that this compromise was reasonable and proper.

The plaintiffs' right of indemnity against the company being admittedly worthless, owing to the company's insolvency, the plaintiffs brought this action against the executors of O. E. Coope, as a former cestui que trust and partner, for indemnity and contribution. Similar actions against the other partners or their estates (except F. J. N. Ind and E. J. Bird, whose estates were believed to be insufficient to justify proceedings) were pending, but had been stayed by agreement pending the decision in this case.

The defendants submitted that the true effect of the agreement of November 15, 1886, was that O. E. Coope and C. P. Matthews and any other of the partners in whom property was vested on behalf of the partners accepted the company as their cestuis que trust and the indemnity of the company as such in lieu and substitution for the partners and their indemnity. They alleged that at that time the indemnity of the company was in fact and was likely to remain more valuable than that of the partners.

They also relied on the fact that prior to and at the date of the agreement of November 15, 1886, O. E. Coope and C. P. Matthews held as joint tenants in trust for the partners in the above stated shares freehold and leasehold property of an aggregate value far exceeding the sums of 5750*l.* and 124*l.* paid by the plaintiffs to the Public Trustee, and that at or about the date of the assignment of November 4, 1887, C. P. Matthews by assignments and conveyances containing recitals substantially similar to those in the above assignment transferred the whole of the other property to the company, without reserving any part thereof or taking any charge to cover the indemnity.

Micklem, K.C., and *Fairfax Luxmoore*, for the plaintiffs. We claim indemnity and contribution from the estate of O. E. Coope,

our testator's late cestui que trust and partner. Prima facie his estate should bear $\frac{250}{560}$ of the liability, but assuming that nothing is recoverable from the estates of F. J. N. Ind and E. J. Bird, which are liable for $\frac{20}{560}$ between them, O. E. Coope's estate must bear $\frac{250}{540}$ of the liability.

The trustee's right to indemnity against his cestui que trust personally is established by *Jervis* v. *Wolferstan* (1), *Fraser* v. *Murdoch* (2), and *Hardoon* v. *Belilios.* (3)

Apart from the relationship of trustee and cestui que trust we also say that, our testator having accepted this liability for the common benefit of the partners, we are entitled to contribution: Lindley on Partnership, 7th ed. p. 403; *Ashhurst* v. *Mason* (4), explained in *Jackson* v. *Dickinson.* (5)

It is apparently suggested by the defendants that the right to indemnity only endures during the relationship of trustee and cestui que trust, and that if a cestui que trust assigns his interest with the trustee's concurrence there is a novation of the right to indemnity. But the change of relationship being quite independent of the trustee's concurrence, which is not required, cannot in itself amount to novation. The agreement of November 15, 1886, did not create any novation, but expressly left it in fieri by clause 4. The assignment of November 4, 1887, and the other conveyances of the property to the company merely carried out clause 6 of the agreement and did not alter the trustee's position as to the right to indemnity.

Hon. Frank Russell, K.C., and *Sargant*, for the defendants. A trustee's right to indemnity against his cestui que trust is of a similar nature to his right to indemnity out of the trust funds. It does not arise from contract. It arises solely from the relationship, and ceases with the consensual termination of that relationship. Suppose a trustee holds funds for A. and B. in moieties. He has a right of indemnity out of the entire funds. Suppose he appropriates specific securities to A. and others to B. He cannot afterwards claim indemnity against B.'s securities for a loss on A.'s securities: *Fraser* v. *Murdoch.* (2) In that case

(1) L. R. 18 Eq. 18, 24.
(2) 6 App. Cas. 855, 872.
(3) [1901] A. C. 118, 123.
(4) (1875) L. R. 20 Eq. 225.
(5) [1903] 1 Ch. 947, 952.

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A. and B. were only life tenants, so that no question of personal indemnity arose. But if they had been absolute owners it seems clear that the trustee could not have claimed any indemnity against B. personally for the loss on A.'s securities.

[SWINFEN EADY J. That was a case of retaining shares for the sole benefit of A.'s moiety. There was not, as here, any direct original liability incurred for the common benefit, and A. and B. were not, as in the present case, the makers of the trust.]

That is so; but does not the case really turn on the complete change of relationship assented to by all parties? Suppose the cestui que trust of a lease assigns his interest. The trustee then holds the lease for the assignee. He is not bound to assign it without a complete indemnity. But suppose he does assign it on an indemnity from the assignee, either because he is satisfied with his indemnity, or because he agreed to do so when the beneficial interest was assigned, is there not a complete cesser of the original relationship, and a complete novation of the original right of indemnity?

Suppose the partnership in the present case had continued. Would the trustees have been entitled to indemnity against the former partners or their estates for twenty years back?

[SWINFEN EADY J. Would not that case in substance be treated as if all the original partners were lessees, so that they and the ultimate partners would have been liable, and the intermediate partners during their holding?]

Not after an unequivocal election to treat the ultimate partners as liable: *Scarf* v. *Jardine*. (1) In the present case the trustees, i.e., the indemnity creditors, the partners, i.e., the old indemnity debtors, and the company, i.e., the new indemnity debtors, were all parties to the agreement of November 15, 1886. By clause 1 the assets became the absolute property of the company, so that the company became the sole cestuis que trust. This view is strengthened by clause 6, which provides that until the property is vested in the company the owners in whose name it is standing "will stand possessed of such property upon trust for the company." By clause 4 the company undertook to pay the partnership liabilities and indemnify the owners. The liability to

(1) (1882) 7 App. Cas. 345.

indemnify the trustees against claims under the lease was a partnership liability which passed to the company. As between the parties to the agreement there was therefore a complete novation of the trustees' right to indemnity. The company became and were accepted by all parties as the sole cestuis que trust and the sole indemnity debtors. The agreement did not, however, affect outside creditors like the lessors who were not parties. The company therefore undertook to take steps to bring about a novation, i.e., with the outside creditors. In the particular case they ought to have effected a surrender of the lease and taken a new lease. That would have terminated the trustees' liability under the existing lease, and the company would alone have been liable under the new lease. But the partnership liability to indemnify the trustees against the existing lease had already been transferred to the company and the company's indemnity accepted in substitution. This transfer and acceptance is not affected by the provision as to obtaining actual novation of the outside liabilities.

Assuming, however, that the agreement of November 15, 1886, though making the company sole cestuis que trust, did not novate the original right to indemnity, and that the old relationship was preserved quoad this indemnity, what was the duty of the surviving trustee to his former cestuis que trust, on being requested to convey the lease and other properties to the company? By clause 6 of the agreement he was bound to execute and do every instrument and thing "which the company may reasonably require" to vest any partnership property standing in his name. Surely the company could not have reasonably required him to divest himself of all the trust property on a mere personal indemnity. As regards himself he could take the risk, but if he still claimed a right of indemnity against his former cestuis que trust he ought to have retained a sufficient part of the property to cover this indemnity, until the company had novated all outside liabilities. Instead of doing this he divested himself of all the property without any consultation with his former cestuis que trust and indemnity debtors, thereby putting himself and them in a worse position. Surely this was an abandonment of any right to indemnity that remained. The

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plaintiffs' contention that this was merely a ministerial act which he was bound to do under the agreement affords an additional argument that the agreement itself created a complete novation of the internal liabilities, including the liability to indemnify.

SWINFEN EADY J. (after stating the facts). It thus appears that in the present case the whole liability under the lease was paid by the estate of the trustee C. P. Matthews owing to the accident of his being the surviving lessee. If the trustee O. E. Coope had been the surviving lessee his estate would have been sued. In these circumstances the executors of C. P. Matthews say that the original liability was incurred at the request of all the partners, and that all the partners were liable to indemnify the trustees and ought to contribute in proportion to their shares in the partnership.

In *Jervis* v. *Wolferstan* (1) Jessel M.R. expressed the law as follows: "I take it to be a general rule that where persons accept a trust at the request of another, and that other is a cestui que trust, he is personally liable to indemnify the trustees for any loss accruing in the due execution of the trust."

That passage was cited in *Fraser* v. *Murdoch* (2), and Lord Blackburn said: "Perhaps this rule is too broadly stated, as something must depend on the nature of the trust and of the interest of the cestui que trust, but it is not necessary now to say more than that this rule has no application to a case where the maker of the trust is not a cestui que trust." In the present case the partners, the makers of the trust, were all cestuis que trust, and it was at their request that the lease was taken in the names of the two trustees. The rule of Jessel M.R. applies therefore without qualification.

In *Hardoon* v. *Belilios* (3) Lord Lindley in the Privy Council said: "The next step is to consider on what principle an absolute beneficial owner of trust property can throw upon his trustee the burdens incidental to its ownership. The plainest principles of justice require that the cestui que trust who gets all the benefit of the property should bear its burdens unless he can shew some good

(1) L. R. 18 Eq. 18, 24. (2) 6 App. Cas. 855, 872.
(3) [1901] A. C. 118, 123.

reason why his trustee should bear them himself. The obligation is equitable and not legal, and the legal decisions negativing it, unless there is some contract or custom imposing the obligation, are wholly irrelevant and beside the mark."

Again in *Fraser* v. *Murdoch* (1) Lord Blackburn said: "No doubt any one who requests another to incur a liability which would otherwise have fallen on himself is, in general, bound, at law as well as in equity, to indemnify him; this principle applies to many cases, and where a trust is for the benefit of the maker of the trust it may apply to a trustee."

In these circumstances I have no doubt that all the partners in proportion to their shares were originally liable to indemnify their trustees. This indeed is not seriously disputed, but it is contended that the liability to indemnify has run off and is no longer subsisting.

This contention is based on two grounds. First it is urged that the trustees by accepting the company as their cestuis que trust in place of the members of the partnership released those members from any future liability. The language of the agreement of November 15, 1886, is relied on in support of this contention. Now prima facie the mere change of a cestui que trust does not release the previous cestui que trust from his liability to indemnify the trustee. The cestui que trust can assign his interest without any consent on the trustee's part. Suppose a trustee accepts a lease in trust for A. A. can assign his equitable interest to B. The trustee's consent is not required. After the assignment he will simply hold the lease in trust for B. But the liability of B. is not substituted for that of A. It may be that as between A. and B. the primary liability will fall on B. But that does not affect the trustee's right of indemnity against A.

The only question is whether there is anything in the agreement of November 15, 1886, to alter this position. The defendants specially relied on clauses 4 and 6. They contended that clause 4 worked a novation and that the trustees had accepted the liability of the company in lieu of the partners. In my opinion that is not the true effect of clause 4. The agreement was for the sale of the assets and liabilities as one

(1) 6 App. Cas. 855, 872.

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entirety to the company. By clause 1 they were to take over the freeholds, leaseholds, choses in action, and other assets as their absolute property, with the immaterial exception in clause 2. Clause 3 provided for the allotment of shares in payment. By clause 4 they were to undertake to pay and perform all the debts, liabilities, and engagements of the partnership and keep the owners indemnified therefrom. It is obvious that if the company were taking over the assets and liabilities they should covenant to pay and discharge the liabilities. Clause 4 further provided that the company would "take from time to time all reasonable steps in their power to bring about a novation to the company of all liabilities of the said partnership, and a release therefrom of the said partnership and the several owners." That means that the company would endeavour to obtain the substitution of themselves for the partnership or owners previously liable. That novation was not in fact effected as regards this lease, and in my opinion the agreement did not constitute any novation of the trustees' right to indemnity. Clause 4 made the company liable to pay the rent and perform the covenants, but the trustees as original lessees still remained liable to the lessors. On the company's default, the trustees were liable to pay the rent and perform the covenants, and the liability of the partners to indemnify them was not put an end to by the agreement. In other words the liability of the company was not in substitution for the original liability of the partners.

Secondly, it was pointed out that at or about the date of the assignment of the lease to the company on November 4, 1887, C. P. Matthews assigned other freehold and leasehold property without retaining any part thereof or taking any charge to cover the indemnity, and it was contended that he had thereby lost his right of indemnity against the partners. The company, however, was then looked on as a sound and flourishing concern, and all the partners were parties to the agreement of November 15, 1886, and all agreed that the whole property was to be assigned. One partner could not, having regard to this agreement, keep back part of the property by way of indemnity. Under clause 6 each partner was bound at the request of the company to execute and do every instrument and thing which the company

might reasonably require for vesting the property in the company. Under this agreement C. P. Matthews was bound to transfer the property including the lease at the company's request. If he had claimed to retain part of the freeholds by way of indemnity the company would have rightly said that it was a breach of the agreement. As a matter of fact the company was considered prosperous and the question was not raised.

The action therefore succeeds, and in equity ought to succeed. It is only owing to the accident that O. E. Coope predeceased C. P. Matthews that the latter's estate was alone sued by the Public Trustee. It would be most inequitable if the whole liability were thrown on the estate of C. P. Matthews merely because he happened to survive O. E. Coope, especially as O. E. Coope was the largest owner.

The defendants admitting assets for the purpose of this order, there will be a declaration that they are bound to contribute and pay to the plaintiffs $\frac{250}{560}$ of 5874*l.*, being the aggregate amount of 5750*l.* and 124*l.* paid by the plaintiffs to the Public Trustee, with 4 per cent. interest from January 31, 1910, the date of payment. There must also be an inquiry whether the estates of F. J. N. Ind and E. J. Bird or either of them are able to contribute their proper proportions of $\frac{10}{560}$ and $\frac{10}{560}$, and, if unable, an inquiry what further sum the defendants ought to pay. If the defendants are prepared to waive these inquiries there will be judgment for $\frac{250}{540}$ of the aggregate sum. The defendants must pay the costs of the action.

Liberty to apply.

Solicitors: *Dawes & Sons; Bischoff, Dodgson, Coxe, Bompas & Bischoff.*

G. R. A.

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In re HUDSON.

SPENCER *v.* TURNER.

[1910 H. 2880.]

Revenue—Estate Duty—Incidence—Donatio Mortis Causa—Will—Direction to pay Testamentary Expenses—Estate Duty on Donation—Charge on Property—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 2, *sub-s.* 1; *s.* 6, *sub-s.* 2; *s.* 9, *sub-s.* 1; *s.* 22, *sub-s.* 2 (*a*).

The subject-matter of a donatio mortis causa is "property which does not pass to the executor as such" within s. 9, sub-s. 1, of the Finance Act, 1894. If, therefore, the executor pays the estate duty upon it, he will be entitled to recover from the donee the amount of the duty so paid, which, under the sub-section, will be a first charge on the subject-matter of the donation.

Estate duty on the subject-matter of a donatio mortis causa is not a testamentary expense, and is, therefore, not payable by the executor under a direction in a will to pay "testamentary expenses" out of the testator's residuary estate.

Porte v. *Williams*, [1910] W. N. 233; ante, p. 188, followed.

Quære, is the subject-matter of a donatio mortis causa property "of which the deceased was competent to dispose at his death" within the meaning of s. 6, sub-s. 2, of the Finance Act, 1894?

Adjourned Summons.

Thomas Pedder Hudson by his will, dated June 24, 1909, after appointing executors and trustees thereof, giving certain pecuniary legacies, and making a certain specific devise, devised and bequeathed all his real and personal estate not thereby otherwise disposed of unto his trustees upon trust to sell, call in, and convert the same, and out of the moneys thereby produced and his ready money to pay his funeral and testamentary expenses and debts and the legacies thereby bequeathed, and to invest the residue of the said moneys and to stand possessed of the investments representing the same upon the trusts thereinafter declared.

The testator died on June 27, 1909, and his will was duly proved.

Shortly before his death the testator handed to Mrs. Violet Gertrude Turner (then Mrs. Violet Gertrude Taylor) certain

deposit notes representing in all the sum of 2000*l*. Subsequently to his death Mrs. Turner handed these notes to the executors for safe custody pending the determination of the question whether the delivery to her of them constituted a valid donatio mortis causa.

By an order dated June 8, 1910, and made in an action of *Hudson* v. *Spencer* (1), it was declared that the delivery to Mrs. Turner of the deposit notes constituted a valid donatio mortis causa in her favour of the sums represented by the notes, subject to the payment thereout of certain debts of the testator, and it was ordered that the defendants, the executors, should pay to her the sums they had received on cashing the notes.

In accordance with the order the executors paid to Mrs. Turner the sums thereby directed upon an undertaking by her to repay or account to them for all sums paid and to be paid by them for estate duty in respect of the donation in the event of it being found that such duty was not payable out of the testator's residuary estate.

This was an originating summons taken out by the executors against Mrs. Turner for the determination of the question (inter alia) whether so much of the estate duty payable on the death of the testator as was attributable to and payable in respect of the donatio mortis causa of the deposit notes was charged upon and payable out of the sums represented by the deposit notes, or whether the same was payable out of the residuary estate of the testator.

F. C. Watmough, for the summons. The subject-matter of a donatio mortis causa is not property "of which the deceased was competent to dispose at his death" within s. 6, sub-s. 2, of the Finance Act, 1894, although, no doubt, it is property which would have to be included in an account under s. 38 of the Customs and Inland Revenue Act, 1881, which is incorporated by s. 2, sub-s. 1 (*c*), of the Act of 1894. But even admitting that the executor is accountable for the estate duty under s. 6, sub-s. 2, a rateable part of the duty on the estate, in proportion to the value of the donation, will under s. 9,

(1) [1910] 2 Ch. 285.

WARRINGTON J. 1910 HUDSON, *In re.* SPENCER *v.* TURNER.

sub-s. 1, of the Act be a first charge on the property in respect of which the duty is leviable.

[WARRINGTON J. referred to s. 8 of the Act.]

The effect of sub-s. 4 of that section is to make the donee accountable for the duty. In many cases an executor might be unable to include a donation in his account because he might not be aware of its existence. Sect. 39 of the Customs and Inland Revenue Act, 1881, shews that the person to account for the duty under that Act was the donee and not the executor.

[WARRINGTON J. But the subject-matter of a donatio mortis causa is liable for the donor's debts.]

That is so no doubt, but only if the donor's estate is insufficient to discharge them, and on the ground that otherwise the donation would be fraudulent as against creditors: *Smith* v. *Casen.* (1) The assent of the executor to a donation is not necessary. The donee does not claim under but against the executor. The characteristics of a donatio mortis causa are stated in Williams on Executors, 10th ed. pp. 599, 600. It is admitted that the legal title to the property in this instance passed to the executors, but they took it only as bare trustees for the donee.

Further, although the executor may have to account for the duty, it is not, it is submitted, one of the "testamentary expenses" which the executors are by the will directed to pay. "Testamentary expenses" do not include settlement estate duty (*In re King* (2)) or legacy duty (*In re Spencer Cooper* (3)), for both of which the executor is accountable, but are confined to so much of the estate duty as represents the old probate duty. (4) Although legacy duty was, probate duty was not, payable in respect of a donatio mortis causa. Account duty was first imposed by s. 38 of the Customs and Inland Revenue Act, 1881, and it is that duty which is replaced by estate duty so far as regards donationes mortis causa. *Porte* v. *Williams* (5), in which Joyce J. held that testamentary expenses did not include estate duty on unappointed personalty, is really conclusive of the present case. The Court ought not, it is submitted, to extend the

(1) (1718) 1 P. Wms. 406, mem.
(2) [1904] 1 Ch. 363.
(3) [1908] 1 Ch. 130.
(4) Ibid. 135.
(5) [1910] W. N. 233; ante, p. 188.

interpretation placed upon the expression "testamentary expenses" by holding that it includes the estate duty payable in respect of a donatio mortis causa.

C. Church, for the defendant. *Porte* v. *Williams* (1) has no application to the present case. There the unappointed property never formed part of the testatrix's estate; here the subject-matter of the donatio mortis causa did form part of the testator's estate for some purposes. It was liable for the payment of his debts. If the testator's estate were insolvent and were being administered by the Court, the Master in taking the accounts would have to certify as to the donation.

[WARRINGTON J. In order that he should do so it would be necessary that a special account should be directed and that the donee should be made a party to the action in order to get that account directed.]

The executor is more than a bare trustee of the subject-matter of a donation. He has a paramount title, and it is his duty to see that all the debts of the testator are paid before he assents to the donation. This is not the ordinary case of a person who constitutes himself a trustee of property for another. The subject-matter of the donation was "property of which the deceased was at the time of his death competent to dispose" within s. 2, sub-s. 1 (*a*), of the Finance Act, 1894, and that being so, the duty was payable by the executor under s. 6, sub-s. 2, of that Act.

But even if it were not "property of which the deceased was at the time of his death competent to dispose," the duty on it was a "testamentary expense" and payable by his executors out of residue: *In re Clemow* (2); *In re Fearnsides*. (3)

In re King (4) was a case as to settlement estate duty and is distinguishable on that ground.

From whatever point of view the subject-matter of this donation is to be regarded, the executors could not have withdrawn the money represented by the deposit notes without producing the probate of the will to the bank.

[WARRINGTON J. Was not the testator himself from the time

(1) [1910] W. N. 233; ante, p. 188.
(2) [1900] 2 Ch. 182, 194.
(3) [1903] 1 Ch. 250.
(4) [1904] 1 Ch. 363.

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of the donation a trustee for the donee of the subject-matter of it, subject to his right to resume at any time the dominion over it?]

The testator, it is submitted, retained an interest in the subject-matter of the donation up to the time of his death, and that interest on his death passed to his executors "as such." All property for which, as here, the executor is accountable passes to the executor as such: *In re Hadley.* (1) The duty is therefore payable out of the testator's residuary estate.

F. C. Watmough was not called upon to reply.

WARRINGTON J. The question in this case is whether so much of the estate duty payable in respect of the testator's estate as is attributable to the subject-matter of a donatio mortis causa is payable out of the general estate of the testator or by the donee. The testator made a donatio mortis causa of a sum of money owing to him on a deposit account in favour of the defendant by the delivery to her of the deposit notes.

The material provisions of the Finance Act, 1894, are the following: Sect. 2, sub-s. 1, provides that "Property passing on the death of the deceased shall be deemed to include the property following, that is to say: (*a*) Property of which the deceased was at the time of his death competent to dispose"; and then "(*c*) Property which would be required on the death of the deceased to be included in an account under section 38 of the Customs and Inland Revenue Act, 1881." Amongst the property which would be required to be included in an account under s. 38 of the Customs and Inland Revenue Act, 1881, is the subject-matter of a donatio mortis causa. By s. 6, sub-s. 2, of the Act of 1894, "The executor of the deceased shall pay the estate duty in respect of all personal property (wheresoever situate) of which the deceased was competent to dispose at his death, on delivering the Inland Revenue affidavit, and may pay in like manner the estate duty in respect of any other property passing on such death." Sect. 9, sub-s. 1, provides that "A rateable part of the estate duty on an estate, in proportion to the value of any property which does not pass to the executor as such, shall be a

(1) [1909] 1 Ch. 20, 30.

first charge on the property in respect of which duty is leviable." Then by the definition section, s. 22, sub-s. 2 (*a*), it is provided that "A person shall be deemed competent to dispose of property if he has such an estate or interest therein or such general power as would, if he were sui juris, enable him to dispose of the property."

The question under the Finance Act is whether the estate duty on the subject-matter of a donatio mortis causa comes within sub-s. 1 of s. 9 as a duty on "property which does not pass to the executor as such"; because if so, it will under that sub-section be a first charge on the property in respect of which it is leviable. Does the subject-matter of a donatio mortis causa pass to the executor as such? Quite plainly not. The executor, in the case of an ordinary donatio mortis causa of chattels, to which alone I think the ancient law originally applied, had no interest whatever in it; his assent to it was not required; it did not form part of the estate of the testator at his death; it was not subject to probate duty. It was subject to legacy duty, but that was by the express terms of the Legacy Duty Act, 1796. It seems to me, therefore, that prima facie, in the case of every donatio mortis causa, the subject-matter of it "does not pass to the executor as such."

But it is said that there is a distinction between a donatio mortis causa of chattels and a donatio mortis causa of a chose in action which is effected by the delivery to the donee of the indicia of title. Is there any real distinction? There is, of course, this distinction in point of law—that the gift is not, at law, complete; it only operates as a complete gift in equity, and some further act on the part of the executor is required. But in my judgment that makes no difference. The subject-matter of a donatio mortis causa does not pass to the executor as such, in my opinion. All that passes to the executor is the bare legal interest which was vested in the testator up to the moment of his death; but the executor holds that bare legal interest not qua executor, but as trustee for the object of the gift—he has no interest in it as executor. It seems to me, therefore, that, so far as the provisions of the Finance Act are concerned, the subject-matter of a donatio mortis causa is "property which

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does not pass to the executor as such," and, therefore, the executor, when he pays the duty, will be entitled to recover the amount of it as a first charge on the property in respect of which the duty is leviable—that is to say, in the present case, in respect of the subject-matter of this donatio mortis causa.

Then it is said that even if under the provisions of the Finance Act, taken by themselves, the duty is not payable out of the testator's general estate, yet the testator has by his will directed that it shall be so paid by directing that his "testamentary expenses" shall be paid out of the general residue; and the question, therefore, that I have to determine is whether what in s. 9, sub-s. 1, of the Act is described as "a rateable part of the estate duty" leviable in respect of the subject-matter of this donation is a testamentary expense within the meaning of the testator's will. The decisions (apart from a case which I leave out for the moment, but which seems to me for the present purpose the most important) amount to this, that the ordinary estate duty on personalty is included in the expression "testamentary expenses," because it is equivalent to probate duty, and on the other hand settlement estate duty, although it is payable by the executor, is not included in "testamentary expenses"; and it has also been decided by Joyce J. that the duty in respect of property over which a testatrix had, but did not exercise, a general power of appointment is not included in "testamentary expenses." That last case seems to me to cover the present case, or, rather, the present case is even an a fortiori one. I will accept for the moment Mr. Church's contention that the subject-matter of a donatio mortis causa is, within the meaning of s. 6, sub-s. 2, of the Finance Act, property "of which the deceased was competent to dispose at his death," because, as we all know, a donatio mortis causa is ambulatory, and is capable of revocation at any moment up to the death of the testator. I doubt whether, within the meaning of s. 6, sub-s. 2, of the Act, it does fall within the description "property of which the deceased was competent to dispose at his death," because, if it does, there would have been no necessity to include it expressly in sub-clause (*c*) as well as in sub-clause (*a*) of sub-s. 1 of s. 2, inasmuch as, according to that view, it would have

passed under sub-clause (*a*). But, assuming that it was "property of which the deceased was competent to dispose at his death," the position then would merely be that the executor would have to pay the duty. The property being property of which the deceased was at the time of his death competent to dispose, the executor would have to include it in his affidavit for probate, and would have to pay the duty on it. But that does not conclude the question, because under s. 9, sub-s. 1, although the executor might have to pay estate duty, a proportionate part of the duty may be thrown upon the particular property.

The case before Joyce J. to which I have already referred is *Porte* v. *Williams*. (1) There a testatrix had a general power of appointment under the will of her late husband. The subject-matter, therefore, of that power was property of which she was competent to dispose at her death—about that there is no question. She made a will by which she expressly disclaimed any intention of exercising that power. She directed that her trustees should, out of her general residue, pay her testamentary expenses, and it was contended that, because the executor was accountable for and had to pay the duty in the first instance, inasmuch as the property in question was property of which the testatrix was competent to dispose, therefore the duty was a testamentary expense. But Joyce J. negatived that contention, and it seems to me that in principle there is no distinction between that case and the present, unless it be a distinction in favour of the present case, making the principle upon which Joyce J. acted applicable a fortiori in the present case for the reason that here there is, at any rate, some doubt whether the subject-matter of the donation can properly be described as property "of which the deceased was competent to dispose at his death" within s. 6, sub-s. 2, of the Act.

It seems to me, on the whole, that the subject-matter of this gift did not pass to the executors as such—all they took was an interest of no value, being the bare legal title to the chose in action—and that the estate duty is not a "testamentary expense"; that, therefore, the provisions of the Finance Act must take effect, notwithstanding the directions in the testator's

(1) [1910] W. N. 233; ante, p. 188.

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will, and that accordingly a rateable part of the estate duty on the testator's estate in proportion to the value of the subject-matter of the donation must be borne by the donee.

Solicitors: *Allen, Edwards & Oldfield, for Robert Druitt, Bournemouth; Lovell, Son & Pitfield, for Paris, Smith & Randall, Southampton.*

W. I. C.

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Nov. 29.

In re WHITAKER.
DENISON-PENDER *v.* EVANS.

[1906 W. 1989.]

Practice — Costs — Administration Action — Costs of Inquiries relating to particular Shares—Rules of the Supreme Court, Order LXV., *r.* 14B.

A testatrix gave all her residuary estate to trustees upon trust after payment of funeral and testamentary expenses to divide the estate into three funds to be held on separate trusts. The trusts of the second fund were, in the events which happened, to hold one moiety upon the trusts declared concerning the first fund, and the other moiety upon the trusts declared concerning the third. Inquiries were directed to ascertain the persons entitled under the trusts declared concerning the first and third funds respectively, and the inquiries relating to the first fund proved much more costly than those relating to the third fund:—

Held, that each moiety was a share within the meaning of Rules of the Supreme Court, Order LXV., r. 14B, and there being no special reasons to induce the Court to "direct otherwise," the costs of the several inquiries must be paid out of the moiety to which they respectively related.

ELLEN WHITAKER by her will, dated November 23, 1834, gave all her residuary real and personal estate to trustees upon trust for sale and conversion and after payment of her funeral and testamentary expenses to divide the same into three parts and invest and stand possessed of one third part (hereinafter called the Holmes fund) for the testatrix's brother Isaac Holmes for his life with remainder to his children during their respective lives with remainders over to their issue as they should respectively by will appoint and in default to their children who should attain twenty-one or marry in equal shares; and to stand possessed of one other part (hereinafter called the Cook

fund) in trust for the testatrix's sister Margaret Cook for her life, and after her death in trust for her granddaughter Mary Susannah Cook Penny for life, and after her death (subject to a general power of appointment which the testatrix revoked by a codicil), in the event (which happened) of her leaving no issue, the testatrix directed that one half of the Cook fund should be held upon the trusts thereinbefore declared concerning the Holmes fund and the other half upon the trusts thereinafter declared concerning the Denison fund. And the testatrix directed that the remaining third part (hereinafter called the Denison fund) should be held upon trust for her niece Anne Denison for her life, and after her death upon trust for such of her children living at her decease and the issue then living of any deceased child who should attain twenty-one.

Mary Susannah Cook Penny, afterwards the wife of S. S. Nevill, survived the testatrix for many years and died in 1905 without issue.

This action was brought in 1906 for the execution of the trusts of the Cook fund. The plaintiffs were the trustees of the will of Lady Pender, who had died in 1890, having in her life-time become absolutely entitled to and received the Denison fund. The defendants were the trustees of the testatrix's will, one son and one grandson of Isaac Holmes, and the legal personal representative of Mrs. Nevill, the last tenant for life. Inquiries were directed to ascertain who were the persons entitled under the trusts of the will to the Denison fund and the Holmes fund respectively. Both these funds had been divided long before. The inquiries relating to the Denison fund were shortly and easily answered, as Lady Pender had become entitled to the whole fund; but Isaac Holmes, the tenant for life of the Holmes fund, left eleven children who took shares for life, and all their families had to be traced. The inquiries were therefore long and costly, and the result shewed that upwards of thirty persons were entitled to shares, and some of the shares were incumbered.

The action now came on upon further consideration. The only point which appears to call for a report was the question how the costs were to be borne.

The minutes brought in by the plaintiffs provided that the

NEVILLE J. costs of the inquiries as to the Holmes family should be paid out of the moiety of the Cook fund held upon the trusts of the Holmes fund, and the costs of the inquiries relating to the Denison family out of the moiety held upon the trusts of the Denison fund.

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WHITAKER, *In re.* DENISON-PENDER *v.* EVANS.

Peterson, K.C., and *Sargant*, for the plaintiffs.

Butcher, K.C., and *Tennyson*, for the defendants Edward Holmes and J. P. Holmes and a number of persons attending the proceedings interested in the Holmes fund. The general principle is that all the costs of administration, which include the ascertaining of the persons entitled, must be paid out of the general estate and not out of a particular share, because there is no residue until the costs of administration are paid: see judgment of Jessel M.R. in *In re Reeves' Trusts.* (1)

Order LXV., r. 14B (2), which provides for costs being paid out of a particular fund, does not apply to the case. It is a rule passed for relieving residue from costs attributable to a share which has been severed from it. It was passed to meet such extreme cases as *In re Gibbons' Will* (3), where the residue was made to bear the costs of ascertaining the persons entitled to a legacy which had been paid into Court under the Trustee Relief Act. Here the residue is not being administered, the Court is dealing with one separate fund, and the costs have never been divided between different shares of such a fund. If the costs of inquiries as to one moiety are to be paid out of that moiety, the costs ought to be further apportioned between all the shares of the persons entitled. The costs in similar cases have been thrown upon the residue in *In re Baumgarten* (4); *In re Vincent*, (5); *In re Lycett.* (6) In Seton on Judgments, 6th ed. p. 1514, the old cases which throw the costs on the whole estate are cited as still being law.

J. M. Gover, for parties in the same interest. In *In re*

(1) (1877) 4 Ch. D. 841, 844.

(2) "The costs of inquiries to ascertain the person entitled to any legacy, money, or share, or otherwise incurred in relation thereto, shall be paid out of such legacy, money, or share, unless the judge shall otherwise direct."

(3) (1887) 36 Ch. D. 486.

(4) (1900) 82 L. T. 711.

(5) [1909] 1 Ch. 810.

(6) (1897) 13 Times L. R. 373.

Groom (1) North J. decided that where there is a direction as there is in this case to pay testamentary expenses the costs must fall on the whole estate.

Peterson, K.C., in reply. The question depends on the meaning of the word share. The will gives three different shares and then divides one of them into moieties. These moieties are shares within the meaning of the rule, and the rule directs that each share shall bear its own costs unless the judge otherwise directs. The cases decided since the rule was made which were cited are simply instances of cases in which the judge has found some reason for giving the direction which the rule empowers him to give. There is no case for such a direction here. In many cases the Court has decided upon the ground of the testator's intention to be inferred from the gift of a share of residue because the residue could not be ascertained until the costs were paid. That ground does not apply here, for the residue was ascertained and divided long ago. There is no question between a share and the residue. The Court is only administering a share. The question is whether the "share" to bear the costs is the whole one third share or a moiety. The plaintiffs say it is the moiety.

P. S. Stokes, for the trustees of the testator's will.

Jenkins, K.C., and *C. Garnett*, for the legal personal representatives of the tenant for life.

Whinney, for an incumbrancer of a share in the Holmes fund.

NEVILLE J. I have felt some difficulty in deciding the point in this case because I do not think the words of Order LXV., r. 14B, are very clear, and I do not get much help from the authorities because in every reported case on the point the Court has found reasons for giving the special direction which the Order unquestionably empowers it to give.

The facts of the present case are these. An estate was originally divided into thirds, each of which was given upon trust for different classes of persons. One of these thirds was, in the events which have happened, to be divided into halves, and each half held upon the trusts of one of the other thirds. The third

(1) [1897] 2 Ch. 407.

NEVILLE J. 1910 WHITAKER, *In re.* DENISON-PENDER *v.* EVANS.

which was given in the way I have described was long ago vested in separate trustees, and the present proceedings relate to it alone. The other thirds have been divided. The question is whether the costs of inquiries directed to ascertain the members of the classes entitled to the moieties respectively should come out of the third generally or out of the moiety to which they relate. That of course depends upon the question what is under these circumstances a share within the meaning of the rule. So far as I can see, that is a matter which will have to be decided by the Court in every case which comes before it. I think that the minutes ought to provide for the incidence of the costs, and the question ought not to be left to the taxing Master without an indication of what the share is out of which the costs are to come. It appears to me that, if in the case before me I were to give a direction that the costs should be paid otherwise than according to the direction in the rule, I should be in effect nullifying the rule altogether, for I cannot conceive how it can ever be enforced as a rule of general application if it is not enforced in a case of this kind. The words of the rule are general, and I do not think that the judge was intended to "direct otherwise" merely because the costs of the inquiries are costs of general administration. In the absence of some special circumstances such as those which existed in the cases cited the rule should be followed and the case should not in my opinion be withdrawn from its operation by the direction of the judge. I ought, I think, to make the order in the terms suggested by the minutes and to treat each moiety as a share within the rule.

Solicitors: *Barlow, Barlow & Lyde; Chester & Co.; Kennedy, Ponsonby & Ryde, for Roberts & Martyn, Chester; Ridsdale & Sons, for Geo. Twell, Hull; Carleton Holmes, Son & Fell; Billing & Co., for Parker, Ayre & Co., Manchester.*

J. R. B.

BROWNE *v.* FLOWER.

[1910 B. 1310.]

PARKER J.

1910

Nov. 2, 3, 21.

Injunction — Landlord and Tenant—Light — Easement—Quiet Enjoyment—Derogation from Grant — Staircase overlooking Bedroom — Privacy — Comfort.

In September, 1905, a flat consisting of twelve rooms on the ground, first, and second floors of F. mansions was let to Mrs. L. In November, 1907, a flat on the ground floor of the mansions was let to the plaintiffs. Both flats had windows overlooking a garden belonging to the lessors. Mrs. L.'s agreement contained a clause prohibiting the use of her flat otherwise than as a dwelling-house, and the plaintiffs' agreement comprised a covenant for quiet enjoyment and a stipulation that they should not use their flat otherwise than as a private residence. Each agreement contained a stipulation that the tenants would not do anything on the demised premises which might be a nuisance to the lessors or to the occupiers of adjoining premises or which might tend to lessen the value thereof. In 1909 Mrs. L. subdivided her flat and, with the consent of the lessors, erected an open-work iron staircase from the garden to an entrance to her flat on the first floor; and in 1910 let it and the part of her flat to which it gave access to K. The staircase was situated between the windows of two of the bedrooms in the plaintiffs' flat, and the fact that it was used as the only access to K.'s flat seriously affected the plaintiffs' privacy, for persons using the staircase could see directly into the rooms. The plaintiffs brought this action claiming to have the staircase removed, an injunction, or compensation:—

Held, that Mrs. L. had done nothing on her premises in breach of her covenant; that the flats were not the subject of any general building scheme; that the only interference with the plaintiffs' premises was interference with their comfort and privacy; that that was not a sufficient interference to bring the case within the principle that a derogation from a grant was a breach of a covenant for quiet enjoyment; and that the claim failed.

This was an action in which the plaintiffs claimed an order that the defendants should pull down and remove a staircase which they had erected in front of the plaintiffs' windows and an injunction to restrain them from doing anything so as to interfere with the access of light and air to the plaintiffs' premises, or to be a nuisance to the plaintiffs, or to depreciate the value of their premises as a residence or interrupt or disturb them in

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their enjoyment thereof. The following statement of facts is taken from the judgment of Parker J.

On September 29, 1905, Percy Clark, acting on behalf of the persons entitled to the rents and profits of the hereditaments thereinafter mentioned, entered into an agreement with the defendant Mrs. Lightbody for the demise to her for five years from September 29, 1905, of a flat consisting of twelve rooms on the ground, first, and second floors of Fulthorpe Mansions, Warwick Road, Paddington. On November 25, 1907, Percy Clark, acting on behalf of the same persons, entered into an agreement with the plaintiffs for the demise to them for five years from December 25, 1907, of another flat consisting of eight rooms on the ground floor of Fulthorpe Mansions. Each flat had windows overlooking a garden belonging to the lessors. In the first agreement was contained a clause prohibiting the use of the demised premises otherwise than as a dwelling-house, and in the second was contained a covenant for quiet enjoyment and a clause prohibiting the use of the demised premises otherwise than as a private residence. Each agreement contained a stipulation that the tenants would not do or suffer or permit anything to be done or carried on on the demised premises which might be or become a nuisance to the landlord or the occupiers of the adjoining or neighbouring premises or the head landlords, or which might tend to lessen the value of the hereditaments for the time being forming part of the Paddington Estate or any part thereof as a residential property. In the year 1909 Mrs. Lightbody desired to sub-divide her flat into two smaller flats, and for the purpose of making an entrance to one of these smaller flats to build a staircase from the garden to an entrance on the level of the first floor. For this purpose she applied to the defendant Mrs. Flower, who, as second mortgagee by sub-demise, was and is still in receipt of the rents and profits of Fulthorpe Mansions, and informed her of her desires, and, contrary to the fact, that the plaintiffs had no objection to the proposal; and by an agreement dated October 27, 1909, Mrs. Flower gave the necessary licence, Mrs. Lightbody's tenancy being at the same time extended for a further period of two years. At the end of 1909 or the beginning of 1910 Mrs.

Lightbody, pursuant to this licence, erected an open-work iron staircase from the garden to an entrance into her premises on the first floor; and by an agreement dated January 29, 1910, let it, together with that part of her premises to which it gave access, to the defendant Kendrick for a term expiring at the same time as her own extended tenancy. This staircase is situate between the windows of two of the plaintiffs' rooms on the ground floor which are used as bedrooms, and the fact that it constitutes and is used as the only means of access to Mr. Kendrick's premises on the first floor seriously affects the plaintiffs' privacy, for persons using the staircase can see directly into these rooms.

A. Grant, K.C., and *F. Baden Fuller*, for the plaintiffs. As against Mrs. Lightbody we are entitled to bring this action on her covenant not to do anything which might become a nuisance to us; for these covenants are binding on and enforceable by all the tenants of the flats inter se: *Hudson* v. *Cripps* (1), following *Spicer* v. *Martin*. (2) The lessor is also bound by the general scheme—*Jaeger* v. *Mansions Consolidated, Ld.* (3)—and these covenants will not be confined to legal nuisances: *Tod-Heatly* v. *Benham*. (4) We do not say that our light has been sufficiently interfered with to enable us to support an action on the principle of *Colls* v. *Home and Colonial Stores* (5); but as against Mrs. Flower we submit that the permission given by her to erect this staircase is a derogation from her grant and a breach of her covenant for quiet enjoyment. Recent cases have laid down that there is no breach of a covenant for quiet enjoyment unless there is actual physical disturbance of the property, and we do not allege that in the present case there has been such a disturbance of our flat, except that the staircase interferes with the light: *Sanderson* v. *Berwick-upon-Tweed Corporation* (6); *Tebb* v. *Cave* (7); *Robinson* v. *Kilvert* (8); *Davis* v. *Town Properties Investment Corporation*. (9) But the authorities shew that any

(1) [1896] 1 Ch. 265.
(2) (1888) 14 App. Cas. 12.
(3) (1903) 87 L. T. 690.
(4) (1888) 40 Ch. D. 80.
(5) [1904] A. C. 179.
(6) (1884) 13 Q. B. D. 547.
(7) [1900] 1 Ch. 642.
(8) (1889) 41 Ch. D. 88.
(9) [1903] 1 Ch. 797.

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derogation from the lessor's grant is a breach of the covenant for quiet enjoyment: *Robinson* v. *Kilvert*. (1) Easements are implied over the other land of the lessor as necessary for the enjoyment of the demised premises, and any interference with them is a breach of the covenant which the Court will restrain. This has been extended to many things which are not legal easements. The grantor of land to be used for a particular purpose is under an obligation to abstain from doing anything on adjoining property belonging to him which would prevent the land granted from being used for the purpose for which the grant was made: *Aldin* v. *Latimer Clark, Muirhead & Co.* (2) Here the lessor is permitting an interference with the use of our rooms as bedrooms although she knew they were to be used for that purpose. In order to use them we should have to put blinds over the whole of the windows, and then we should be compelled to use artificial light.

Martelli, K.C., and *Wurtzburg*, for Mrs. Flower. We do not deny that the plaintiffs have cause for complaint, but the question is whether we are liable in this action. There has been no interference with the plaintiffs' reasonable enjoyment of their flat, and we have only permitted the erection of a bridge. We have agreed to nothing which must necessarily be a nuisance to them. The Court is asked to go beyond all the authorities. There is no case in which it has been held that interference with privacy or comfort gives any right of action at law or in equity; and the contrary has been held in *In re Penny and South Eastern Ry. Co.* (3) and *Turner* v. *Spooner*. (4) Therefore we are not liable in an action on the covenant for quiet enjoyment. It has never yet been held that depriving the tenant of something for which no action would lie is a breach of the covenant.

[PARKER J. That would be so in a simple case, but a flat is let for a particular purpose, and if there is any derogation from the grant that is a breach of the covenant. Residential rooms involve privacy.]

The words of the covenant cannot be enlarged by implication. No doubt if the grant of the property implies the grant of

(1) 41 Ch. D. 88, 95.
(2) [1894] 2 Ch. 437, 446.
(3) (1857) 26 L. J. (Q.B.) 225.
(4) (1861) 30 L. J. (Ch.) 801, 803.

easements within *Wheeldon* v. *Burrows* (1), that would be sufficient; but the easement or quasi-easement must be something which can grow into a right at common law. There is no such thing as an easement of privacy; there is no covenant here against interference with privacy. Therefore we are not liable: *Jenkins* v. *Jackson*. (2) The express covenant for quiet enjoyment excludes any implied covenant: *Dennett* v. *Atherton*. (3) Privacy does not even come within *Aldin* v. *Latimer Clark, Muirhead & Co.* (4), for it is only one of the amenities of a place and not a question of physical disturbance. A tenant has no right to have the amenities of his house preserved in exactly the same state as when he entered.

W. H. Cozens-Hardy, for Mrs. Lightbody. We have done nothing which is or can become a nuisance to the plaintiffs; there is no building scheme, and the plaintiffs cannot bring an action against us.

J. Israel, for Mr. Kendrick. We have done nothing which the plaintiffs can complain of, so the action as against us should be dismissed with costs.

A. Grant, K.C., in reply. Our rooms can no longer be used for the purposes for which they were demised. It is enough if they have been made "less fit" for the purpose: *Aldin* v. *Latimer Clark, Muirhead & Co.* (5) Any diminution of light is sufficient for this purpose: *Herz* v. *Union Bank of London*. (6) We do not say there is an easement of privacy, but the principle of derogation from the grant is applied according to the circumstances of each case, whether there is any common law right or not: *Myers* v. *Catterson* (7); *Popplewell* v. *Hodkinson*. (8) The covenant against nuisance must cover more than common law nuisance or it would not be inserted. Common law nuisance is actionable without a covenant.

Cur. adv. vult.

Nov. 21. PARKER J. stated the facts, and continued:—It is not contended that the staircase itself interferes with the light

(1) (1879) 12 Ch. D. 31.
(2) (1888) 40 Ch. D. 71.
(3) (1872) L. R. 7 Q. B. 316, 327.
(4) [1894] 2 Ch. 437.
(5) [1894] 2 Ch. 447.
(6) (1859) 2 Giff. 686.
(7) (1889) 43 Ch. D. 470.
(8) (1869) L. R. 4 Ex. 248.

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coming to the plaintiffs' windows to such an extent as to be actionable on the principles laid down in *Colls* v. *Home and Colonial Stores* (1); but it is said, and I think truly said, that if the plaintiffs, in order to secure their privacy, notwithstanding the existence of the staircase, curtain their windows with material of sufficient extent and thickness to prevent persons seeing into their rooms, the diminution of light in their rooms will be appreciable and their comfort interfered with.

The question is whether under the circumstances the plaintiffs are entitled, as they claim, either to have the staircase removed or to be compensated in damages. They put their case in various ways. First, as against Mrs. Lightbody they say that she has committed a breach of her agreement not to do anything on the premises the subject of the demise to her which may be or become a nuisance to the occupiers of the adjoining or neighbouring premises (including the plaintiffs' flat), or which may tend to lessen the value of the hereditaments for the time being forming part of the Paddington Estate or any part thereof. They claim to enforce this agreement upon the principle of *Spicer* v. *Martin* (2) and other well-known cases. In my opinion what Mrs. Lightbody has done is not on the "demised premises" at all within the meaning of the agreement. It is on adjoining land belonging to her lessor. And further, I do not see my way to hold that there was any such scheme for letting Fulthorpe Mansions in flats as would bring the case within *Spicer* v. *Martin*. (2) It is true that there is a similar stipulation in all the leases of flats in the mansions, but that, as Mr. Clark explained, was because of certain covenants in the head lease, and not in order to benefit the tenants of the flats generally. It is quite certain that in other respects there was no single form of lease prepared or adopted for all the flats, nor did the plaintiffs inquire, nor were they informed, as to the terms on which other flats in the building were let or intended to be let.

The plaintiffs next relied on the maxim that no one can be allowed to derogate from his own grant. This maxim is generally quoted as explaining certain implications which may arise from the fact that, or the circumstances under which, an

(1) [1904] A. C. 179. (2) 14 App. Cas. 12.

owner of land grants or demises part of it, retaining the remainder in his own hands. The real difficulty is in each case to ascertain how far such implications extend. It is well settled that such a grant or demise will (unless there be something in the terms of the grant or demise or in the circumstances of the particular case rebutting the implication) impliedly confer on the grantee or lessee, as appurtenant to the land granted or demised to him, easements over the land retained corresponding to the continuous or apparent quasi-easements enjoyed at the time of the grant or demise by the property granted or demised over the property retained. For example, if the owner of a house with windows overlooking vacant land of the same owner grant or demise the house, the grant or demise will in general by implication confer on the grantee or lessee easements of light and support over or by the vacant land. The terms of the grant or demise or the special circumstances of the case may, however, rebut the implication. Further, the circumstances of the case may be such that though at the time of the grant or demise there be no continuous or apparent quasi-easements enjoyed by the property granted or demised over the property retained, yet easements over the property retained may be impliedly created and become appurtenant to the property granted or demised. Thus, if the grant or demise be for the purpose of erecting a building with defined windows overlooking other land of the grantor or lessor, an easement of light to such windows over such other land will be created, and similarly there will be created an easement of support by the land retained for the building to be built. But again these implications may be rebutted by the special circumstances of the case. Inasmuch as our law does not recognize any easement of prospect or privacy, and (as I have already held) the plaintiffs' lights are not interfered with, it is difficult to find any easement which can have been interfered with by the erection of the staircase in question.

But the implications usually explained by the maxim that no one can derogate from his own grant do not stop short with easements. Under certain circumstances there will be implied on the part of the grantor or lessor obligations which restrict the user of the land retained by him further than can be explained by

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the implication of any easement known to the law. Thus, if the grant or demise be made for a particular purpose, the grantor or lessor comes under an obligation not to use the land retained by him in such a way as to render the land granted or demised unfit or materially less fit for the particular purpose for which the grant or demise was made. In *Aldin* v. *Latimer Clark, Muirhead & Co.* (1), land having been demised for the purpose of carrying on the business of a timber merchant, the lessor came under an obligation not to build on land retained by him so as to interrupt the access of air to sheds on the demised property used for drying timber, although the law does not recognize any easement of air unless it comes through or to some defined passage or aperture. Similarly in the case of *Grosvenor Hotel Co.* v. *Hamilton* (2) the lessee was held entitled to prevent the lessor from using property retained by him in such a way as to cause on the demised property vibrations which did not amount to a legal nuisance, though there is no such easement known to the law as an easement of freedom from vibration any more than there is an easement of freedom from noise. Once again, though possibly there may not be known to the law any easement of light for special purposes, still the lease of a building to be used for a special purpose requiring an extraordinary amount of light might well be held to preclude the grantor from diminishing the light passing to the grantee's windows, even in cases where the diminution would not be such as to create a nuisance within the meaning of the recent decisions: see *Herz* v. *Union Bank of London.* (3) In none of these cases would any easement be created, but the obligation implied on the part of the lessor or grantor would be analogous to that which arises from a restrictive covenant. It is to be observed that in the several cases to which I have referred the lessor had done or proposed to do something which rendered or would render the demised premises unfit or materially less fit to be used for the particular purpose for which the demise was made. I can find no case which extends the implied obligations of a grantor or lessor beyond this. Indeed, if the implied

(1) [1894] 2 Ch. 437. (2) [1894] 2 Q. B. 836.
(3) 2 Giff. 686.

obligations of a grantor or lessor with regard to land retained by him were extended beyond this, it is difficult to see how they could be limited at all. A landowner may sell a piece of land for the purpose of building a house which when built may derive a great part of its value from advantages of prospect or privacy. It would, I think, be impossible to hold that because of this the vendor was precluded from laying out the land retained by him as a building estate, though in so doing he might destroy the views from the purchaser's house, interfere with his privacy, render the premises noisy, and to a great extent interfere with the comfortable enjoyment and diminish the value of the property sold by him. It is quite reasonable for a purchaser to assume that a vendor who sells land for a particular purpose will not do anything to prevent its being used for that purpose, but it would be utterly unreasonable to assume that the vendor was undertaking restrictive obligations which would prevent his using land retained by him for any lawful purpose whatsoever merely because his so doing might affect the amenities of the property he had sold. After all, a purchaser can always bargain for those rights which he deems indispensable to his comfort.

Under these circumstances the question is whether the existence of this staircase renders the plaintiffs' premises unfit or materially less fit to be used for the purposes for which they were demised, that is, for the purposes of a residential flat. In my opinion it does not. The two rooms in question can be and are still in fact used for the same purpose for which they were used prior to the erection of the staircase. It is only the comfort of the persons so using the rooms that is interfered with by what has been done. Either they have less privacy, or if they secure their privacy by curtains they have less light. Much as I sympathize with the plaintiffs, it would, in my opinion, be extending the implications based on the maxim that no one can derogate from his own grant to an unreasonable extent if it were held that what has been done in this case was a breach of an implied obligation.

Lastly it was suggested that what has been done constituted a breach of the covenant for quiet enjoyment contained in the

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plaintiffs' agreement. I do not think this point was really pressed, and indeed it could hardly be pressed after the recent decisions on the nature of such a covenant. It appears to me that to constitute a breach of such a covenant there must be some physical interference with the enjoyment of the demised premises, and that a mere interference with the comfort of persons using the demised premises by the creation of a personal annoyance such as might arise from noise, invasion of privacy, or otherwise is not enough. In my opinion, therefore, this action fails. With regard to costs I have come to the conclusion that Mr. Kendrick and Mrs. Flower ought to have their costs in the usual way. I make no order, however, as to Mrs. Lightbody's costs, for I am satisfied that Mrs. Flower would not have allowed the erection of the staircase but for representations made by Mrs. Lightbody that Mrs. Browne did not object, representations which were in fact unfounded.

Solicitors: *Leggatts & Carruthers; Ellis, Munday & Clarke; Swepstone & Stone; Evan P. Houle.*

H. C. R.

WOLSTANTON UNITED URBAN DISTRICT COUNCIL *v.* TUNSTALL URBAN DISTRICT COUNCIL.

C. A. 1910 — *Nov.* 2.

[1909 W. 3362.]

Local Government—Joint Hospital—Management Expenses—Agreement for Apportionment—Adjustment of Liabilities—Local Government Act, 1888 (51 & 52 *Vict. c.* 41), *s.* 62.

Appeal from a decision of Neville J. (1)

The action was brought by the Wolstanton United Urban District Council and two other district councils to enforce payment under certain agreements by the Tunstall Urban District Council and the Corporation of Stoke-upon-Trent of their proportion of the cost of maintaining and managing a hospital known as the Bradwell Isolation Hospital. By his judgment Neville J. declared that two deeds dated respectively June 1, 1885, and August 2, 1905, in the pleadings mentioned were valid and subsisting, and that the defendants had no power to determine them, and directed that the plaintiffs should recover from the defendants 1142*l.* odd, being the defendants' proportion of the management expenses of the hospital for the three financial years ending March 31, 1909, with interest thereon, and that the defendants the Corporation of Stoke-upon-Trent should forthwith levy a rate sufficient to provide for the payment of the said sum and interest, and of any other sum which the plaintiffs might be entitled to recover under the said agreements in the pleadings mentioned, and of the costs of the action, and he ordered the defendants to pay the costs of the action.

The defendants appealed.

Macmorran, K.C., and *Bethune*, for the appellants.

Felix Cassel, K.C., and *W. H. Cozens-Hardy*, for the respondents.

After the appeal had been argued at considerable length an order was agreed to whereby in effect the directions in the judgment subsequent to the declaration were struck out, and it was

(1) [1910] 2 Ch. 347.

C. A. 1910 WOLSTANTON UNITED URBAN COUNCIL v. TUNSTALL URBAN COUNCIL.

ordered that it be referred to the Hon. Alfred Lyttelton, K.C., to make all necessary adjustments under the Local Government Acts, 1888 and 1894, with reference to the hospital, and to determine the rights and liabilities of all parties in connection therewith, and to deal with the costs of the reference and the award.

Solicitors: *M. A. Orgill, for Llewellyn & Son, Tunstall; Waterhouse & Co., for Sherratt & Nelson, Kidsgrove.*

H. B. H.

C. A. 1911 *Jan.* 16.

In re ROBINSON.
CLARKSON *v.* ROBINSON.

[1896 R. 491.]

Money-lender—Registration—Firm Name—Partners' Names—Real Partner's Name not registered—Securities void—Assignee for Value without Notice—Money-lenders Act, 1900 (63 & 64 *Vict. c.* 51), *s.* 1, *sub-s.* 5; *s.* 2, *sub-s.* 1, (*a*), (*c*); *s.* 3.

A purchaser or assignee for value without notice of charges or securities which are void under s. 2 of the Money-lenders Act, 1900, is in no better position than the original holder. That Act gives no protection to any bona fide assignee for value without notice except in the cases expressly dealt with by s. 1, sub-ss. 1, 2, and 3.

APPEAL from a decision of Neville J. (1) which raised the question whether a bona fide purchaser or transferee for value without notice of securities which were illegal under ss. 2 and 3 of the Money-lenders Act, 1900, was in any better position than the original lender.

The facts are given in greater detail in the report of the case in the Court below, but the following summary of them is sufficient for the purposes of this report.

The action was brought in 1906 to administer the estate of the late Peter Robinson, of Oxford Street, and to carry out the trusts of his will. The testator gave his residuary estate equally between such of his named children as should attain the age of twenty-five years. Edward Robinson, a son of the testator, attained twenty-one on September 18, 1901, and between that

(1) [1910] 2 Ch. 571.

date and September 18, 1905, when he attained twenty-five, he created numerous charges on his then contingent share in the testator's estate in favour of various money-lenders. He had married in August, 1903, and on his marriage settled some 200*l*., part of his said share, on usual trusts for himself, his wife and children. Questions arose as to the incumbrances on Edward Robinson's share, and an inquiry was directed in the action as to the validity and priorities of the incumbrances. Under this inquiry a claim was lodged (amongst others) by the Capital and Counties Bank as the assignees for value of four mortgages created by Edward Robinson in favour of Lewis & Co., a firm of money-lenders. "Lewis & Co." was the registered trade name of the firm under the Money-lenders Act, and the names of the individual members of the firm were given as "Charles Alfred Bond and John Colin Bennet carrying on the business of money-lenders at 5 Park Street Nottingham."

The first mortgage was dated April 8, 1903, and was taken in the name of "Charles Alfred Bond and John Colin Bennet of 5 Park Street in the city of Nottingham."

The second mortgage was dated April 15, 1903, and was taken in the name of "John Colin Bennet, of Brooklyn, Denton Boulevard in the city of Nottingham."

The third mortgage was dated May 12, 1903, and was taken in the names of "Charles Alfred Bond and John Colin Bennet trading under the registered name of Lewis & Co. at 5 Park Street in the city of Nottingham."

The fourth mortgage was dated March 25, 1904, and was taken in the name of "Lewis & Co. 5 Park Street Nottingham."

By deeds of April 3, 1905, and March 25, 1907, "Lewis & Co." had assigned the above-mentioned mortgages for value to the Capital and Counties Bank, who while the inquiry was proceeding in chambers transferred them for value to a Mr. Grover and a Mr. Dicksee. Charles Alfred Bond and John Colin Bennet were cross-examined on their affidavits in support of their claim, when it transpired for the first time that Charles Alfred Bond was not a member of the firm of "Lewis & Co.," but merely the nominee of his brother George Cresswell Bond, who supplied all the money of the firm.

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The Master by his certificate found that the four charges given to Lewis & Co. were void by reason of the partners in the firm not being duly registered under the Act. Grover took out a summons to vary the finding of the Master, which came on for hearing with the further consideration of the action.

Neville J. held that the securities taken in the names of Charles Alfred Bond and John Colin Bennet, or either of them, or in the name of Lewis & Co., were illegal and void under ss. 2 and 3 of the Money-lenders Act, 1900, and that Mr. Grover, though a purchaser for value without notice of the defect in the registration of the firm, was in no better position. His Lordship therefore dismissed the summons.

Mr. Grover appealed.

Mr. Grover, in person, submitted that the documents and the evidence shewed that he was a bona fide purchaser for value without notice.

[COZENS-HARDY M.R. You may assume for the purposes of your argument that you are a purchaser for value without notice.]

The appellant nevertheless persisted in going through the evidence and the documents to shew that he was entitled to stand in the shoes of the bank, who were, as he alleged, assignees for value of the four mortgages without notice of any defect in the registration of the firm of "Lewis & Co.," commenting severely on the conduct of Edward Robinson and J. C. Bennet, who, as he alleged, was estopped from giving evidence as to any defect in the registration of the firm of "Lewis & Co."

Sub-s. 5 of s. 1 of the Money-lenders Act seems to shew an intention to protect assignees for value without notice; consequently an assignee for value without notice is in a better position than the original holder.

Any defect in the registration would render the security voidable, not void, and in the hands of an innocent purchaser for value it would be enforceable against the borrower. The appellant cited passages from *Whiteman* v. *Sadler* (1) which he considered supported his argument.

(1) [1910] A. C. 514, 521, 527.

Jenkins, K.C., and *MacSwinney*, for the plaintiffs.

Levett, K.C., and *T. L. Wilkinson*, for the trustees of Edward Robinson's marriage settlement.

Butcher, K.C., and *Greaves, T. B. Napier, E. Knowles Corrie, W. H. Cozens-Hardy, Arnold Statham, H. Fletcher Moulton, Stuart Sankey*, and *G. M. T. Hildyard*, for other persons interested in Edward Robinson's share, were not called upon.

COZENS-HARDY M.R., after stating the nature of the appeal and referring to the appellant's comments on the conduct of Edward Robinson, continued :—The only point we have to consider is whether certain securities which were given by Edward Robinson to "Lewis & Co." or some members of the firm are or are not good and valid securities in the hands of the appellant. We invited the appellant to argue the point of law on the assumption that he was a purchaser for value without notice, but he did not accept that invitation, and I think it is a great pity for himself that he did not, for having heard the evidence to which he has called our attention, I have a very strong impression—it is not necessary to decide it—that his contention that he was a bona fide holder for value without notice can in no circumstances avail him here, having regard to the fact that the Capital and Counties Bank knew, and he knew, before taking any part in the transaction, the nature of these securities. But for the purposes of my judgment I will assume that he was a purchaser for value without notice of any defect in the registration, though I do not think that this makes any difference to his position. The facts as found by the learned judge are these : that there was no such firm as Charles Alfred Bond and John Colin Bennet carrying on the business of "Lewis & Co."; that the only firm was one in which George Cresswell Bond was a partner. There was evidence on both sides and there were documents, to which our attention has been called, which passed between the parties before this dispute arose, and on this evidence I am satisfied that we cannot take a different view from the learned judge and hold that George Cresswell Bond was not a partner, or that the money-lenders did register themselves in their own names in accordance with s. 2, sub-s. 1, of the Money-lenders Act, 1900. That being so, we are

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face to face with s. 2, sub-s. 1 (*c*), of the Act, which says that a money-lender, as defined by the Act, shall not take any security in the course of his business as a money-lender otherwise than in his registered name. If he does not register he cannot take the security at all, and if there is a partnership of three and two names only are registered, that is not a registration to which any weight or importance can be attached.

But then it is said that the scheme of the Act itself shews a desire to protect assignees for value without notice. I draw from the consideration of the Act itself an opposite conclusion on this point. It is quite true that in s. 1, sub-s. 5, there is a saving clause that "Nothing in the foregoing provisions of this section shall affect the rights of any bona fide assignee or holder for value without notice," but that seems to me rather to limit the protection given to an assignee for value without notice, because it is not "nothing in this Act shall affect the rights of a bona fide assignee for value," but "nothing in the foregoing provisions of this section"—only that one section—"shall affect a bona fide assignee for value." The security in the present case is not endangered by anything in s. 1, but it is struck at by the plain language of s. 2, sub-s. 1 (*c*). It was not, perhaps, distinctly put by the appellant, but I think he meant to indicate that the effect of the non-registration might be only to render the security voidable and not void. That, however, is contrary, first of all, to a decision by Buckley L.J., when sitting as a judge of first instance, in *Victorian Daylesford Syndicate, Ld.* v. *Dott* (1), and contrary also to the decision of this Court in *Bonnard* v. *Dott* (2), and lastly, and finally, is plainly disposed of by the recent decision of the House of Lords in *Whiteman* v. *Sadler* (3) distinctly approving the decisions of Buckley L.J. and the Court of Appeal. In my opinion these securities are invalid. Even assuming, contrary to what I think is the fact, that there is, in the chain of persons from the original assignment to the appellant, some one person who had no notice, I still think that that would not affect it, because there is no protection to be found in the Money-lenders Act, 1900, for any bona fide assignee

(1) [1905] 2 Ch. 624. (2) [1906] 1 Ch. 740.
(3) [1910] A. C. 514.

for value without notice, except in s. 1, sub-s. 5, which, as I have already explained, does not apply to s. 2.

In my opinion the learned judge was perfectly right in taking the evidence that he did, perfectly right in the conclusions of fact at which he arrived, and perfectly right in the conclusions of law which he drew therefrom. This appeal will be dismissed with costs.

FLETCHER MOULTON L.J. I am of the same opinion. The two points which have been argued before us are, first, that the original securities were not invalidated by the Money-lenders Act, 1900, and, secondly, that if they were invalidated by the Act, the parties who are now represented by the appellant took the securities bona fide without notice of the illegality, and that, therefore, they are in a better position than the original holders.

It was upon the latter point that reliance was mainly placed by the appellants. But it appears to me that no question whatever of bona fide holding without notice can possibly arise with regard to the first two mortgages. These mortgages were clearly given for money-lending transactions to the knowledge of every one, and they purported to be taken by the money-lenders in a name which was not their registered name. Every person, therefore, who took one of them had full notice that the transaction was a prohibited one and that consequently it was void. With regard to the third mortgage, however, the question does arise, because that mortgage was taken in the name of Lewis & Co., which was the registered name of the two persons, Charles Alfred Bond and John Colin Bennet, who purported to be the parties to that mortgage. To decide the question with regard to the main mortgage, therefore, we must look further into the facts. The learned judge has found, and my perusal of the evidence leads me to the same conclusion as the Master of the Rolls, namely, that there was abundant evidence to support the finding, that the real firm was one in which George Cresswell Bond was almost the sole person interested; at all events, it is clear that he was not only a partner but the most important partner of the firm. The consequence is that this firm of money-lenders was not registered at all. The registered firm

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was not the real existing firm. The case does not differ from that of a money-lender A. registering a name as being the name in which a person B., his employee, carries on a money-lending business and taking all the securities in B.'s name. The securities would be really securities for A., a non-registered money-lender, who of course could have no registered name in which they could be taken. I come, therefore, to the conclusion that the third mortgage was within the prohibition of the Act.

The question whether a mortgage coming within the prohibition of the Act is void is not open to dispute now. Buckley L.J., when Buckley J., and Farwell L.J. have both laid it down that a contract which is expressly forbidden and made criminal by this Act can give no cause of action to a party who seeks to enforce it. That principle so formulated has been expressly approved of in *Whiteman* v. *Sadler* (1) in the House of Lords and we must accept it as settled law. There remains only the second point. The appellant suggests that this principle would apply to the original holder only, and that he himself, as being the bona fide holder for value without notice, is in some better position. I think that the true construction of the Money-lenders Act, 1900, puts this contention out of Court. In dealing with the opening of accounts provided for by s. 1, there is in sub-s. 5 an express but guarded protection of bona fide holders for value without notice. But this applies only to "the foregoing provisions," that is to say, the provisions of the earlier portion of s. 1. In s. 2 there is no such protection. It is clear to me, therefore, that when the Money-lenders Act, 1900, was formulated the necessity for some protection in cases under s. 1 was realized, but that protection was not given to transactions which were forbidden by s. 2. For these reasons I am of opinion that a bona fide holder for value of these mortgages without notice (even if the appellant could shew himself to be one) would be in no better position than the original holder. In law the contract is void; it is not merely voidable; and no rights can be maintained under it.

For these reasons I think the decision was right and that this appeal must be dismissed with costs.

(1) [1910] A. C. 514.

BUCKLEY L.J. I agree with the reasoning and conclusions of the judgments which have been delivered. There seems to me to be really no point of importance in the case.

Solicitors: *Capron & Co.; Lidiard, Son & Baker; Colyer & Colyer; Bircham & Co., for John Trewavas, Bradford; Pritchard, Englefield & Co.; Walker, Son & Field; Weldon & Edwards; Holder & Wood.*

W. C. D.

In re LORD CHESTERFIELD'S SETTLED ESTATES.

JOYCE J. 1910 *Oct.* 19, 20; *Nov.* 3.

[1910 C. 397.]

Fixtures—Settled Estates—Mansion House—Carvings — Right of Removal as between Executor and Devisee or Heir.

The executor of a deceased owner in fee has no right to remove from the inheritance more than that which really and properly considered is never fixed to it in a definite way.

By the will of the ninth Earl of C. the H. L. estates, of which he was the absolute owner, were settled to certain uses in strict settlement under which the present Earl was tenant for life with remainder to his issue in tail male, with divers remainders over. The testator also bequeathed certain chattels to go as heirlooms, and gave to the present Earl absolutely all his plate (except such as he had before given to his wife), books, pictures, and other works of art or curiosity (except the heirlooms), china, glass, furniture, carriages, horses, wines, and, generally, all goods, effects, and live and dead stock which at his decease might be in or about his mansion house of H. L. At the death of the testator there were in the mansion house certain ornamental wood carvings by Grinling Gibbons. These carvings were affixed to the walls of various rooms therein by means of nails or pegs driven through them into stiles built into the walls. The testator died in 1887. In 1909 the present Earl sold portions of the settled estates including the mansion house, expressly reserving the carvings. He subsequently removed the carvings from the mansion house and sold a portion of them, claiming to be absolutely entitled to the proceeds of sale thereof. Upon the application by summons of the trustees:—

Held, that the carvings did not pass by the bequest of chattels, but, being fixed in a definite way to the inheritance so as to form part of the house, the proceeds of sale of such as had been sold must be treated as capital money subject to the trusts of the settlement.

ADJOURNED SUMMONS.

This was an originating summons taken out by the trustees, for the purposes of the Settled Land Acts, of the will of Henry

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Edwyn Chandos, ninth Earl of Chesterfield, for the determination of the question whether the purchase-moneys arising upon the sale by the respondent, the tenth Earl of Chesterfield, of certain carvings lately in the dining-room, saloon, drawing-room, study, gilt room, and state bedroom in the mansion house known as Holme Lacy were the absolute property of the respondent, or whether they were, and ought to be treated as, capital moneys arising under the Settled Land Acts from the sale by the respondent of a portion of the property settled by the above-mentioned will.

The testator Henry Edwyn Chandos, ninth Earl of Chesterfield, who was absolute owner of the Holme Lacy estates in Shropshire, by his will, dated December 13, 1884, settled those estates to certain uses in strict settlement, under which the respondent, the present Earl, was tenant for life with remainder to his issue in tail male, with divers remainders over. The testator also bequeathed certain chattels to go as heirlooms, and gave to the present Earl absolutely all his plate (except such as he had before given to his wife), books, pictures, and other works of art or curiosity (except the heirlooms), china, glass, furniture, carriages, horses, wines, and, generally, all goods, effects, and live and dead stock which at his decease might be in or about his mansion house of Holme Lacy.

The testator died on January 21, 1887, leaving him surviving his widow, the Dowager Countess of Chesterfield, and six sons, namely, the present Earl (who was married but had no issue), Captain the Hon. Henry Athol Scudamore Stanhope (who was a bachelor), and four others.

A mansion house had existed on the site of the present house in the time of Henry VIII., and between 1671 and 1696 the then owner (the second Viscount) entirely rebuilt the house. It was upon that occasion (so far as was known) that the carvings in question, which were attributed to Grinling Gibbons, were executed and placed in the mansion house, where they had since remained, substantially in their original positions, until 1909.

The Holme Lacy estates with the mansion house and the carvings therein passed by various devolutions of title to

Frances, Duchess of Norfolk, as absolute owner, and upon her death intestate her real estate, including the said estates and mansion house, including the carvings, devolved upon four co-heirs. In 1821 the said estates and mansion house became vested by partition in Sir Edwyn Francis Stanhope, who was one of the four co-heirs but was not one of the next of kin of the said Duchess, nor was he interested in her personal estate. The testator was the eldest son of Sir Edwyn Francis Stanhope, and became, and was at his death, absolute owner of the said estates and mansion house under or by virtue of dispositions made by the said Sir Edwyn Francis Stanhope.

In 1909 the present Earl sold portions of the settled estates, including the mansion house, the carvings being expressly excepted from that sale. Some of them, however, had recently been sold by the Earl, and the remainder had been removed by him from the mansion house to his London house. The purchase-money for the carvings so sold was deposited at a bank in the joint names of the Earl and the trustees, pending the determination of the question raised by this summons.

The carvings were of great beauty and value. They were in the form of decorative panels suitable to be attached to the walls of a house and to serve as overmantels or frames to pictures. They appeared to have been originally fixed by means of nails or pegs driven through them into stiles built into the walls of the house at Holme Lacy. There was evidence, however, that they were entirely independent of all the constructional work of the house and could be removed without making any difference to the completeness of the panelling in the rooms.

The present Earl claimed to be absolute owner of the carvings under the will of the testator.

Clauson, for the trustees.

Hughes, K.C., and *W. Copping*, for the Earl of Chesterfield. These carvings pass to the Earl under the gift of "works of art or curiosity." They are in no sense part of the architectural construction of the house, but are in the nature of works of art which may be placed in any position required for the purpose of

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decoration. Their value consists in the beauty of the work and not in their appropriateness to any particular position in the house. They are mere personal chattels and as between the executor and the heir would pass to the executor. They are works of art like pictures or tapestry and cannot properly be considered as part of the house. They were originally fixed to the walls for the better enjoyment of the carvings as chattels: *In re De Falbe* (1), a decision which was affirmed by the House of Lords under the name of *Leigh* v. *Taylor*. (2) They were not fixed as part of a general scheme of decoration as was the case with the tapestry in *In re Whaley*. (3)

Younger, *K.C.*, and *Fildes*, for the respondent Captain Stanhope. These carvings are part of the mansion house and pass with the settled estates. They have been practically fixed in the same position for 200 years. When they were originally placed in position in the house there could have been no idea of their being removed, being intended to adorn and beautify the house, as a dwelling place, and to be enjoyed therewith. The traffic in such works of art is a modern institution. At the recent sale of the mansion the carvings were specially reserved, otherwise they would have passed to the purchaser as part of the house.

Where articles have in fact become attached to the freehold as between the heir and the executor the burden is on the executor to shew that they do not pass with the inheritance: *Holland* v. *Hodgson* (4); *Norton* v. *Dashwood* (5); *D'Eyncourt* v. *Gregory* (6); *In re Hulse*. (7)

Hughes, *K.C.*, in reply, referred to *Squier* v. *Mayer*. (8)

Cur. adv. vult.

Nov. 3. JOYCE J. The ninth Earl of Chesterfield, who died in the year 1887, was the absolute owner of the well-known mansion Holme Lacy and all that it contained. The present question arises in consequence of the recent sale of that mansion

(1) [1901] 1 Ch. 523.
(2) [1902] A. C. 157.
(3) [1908] 1 Ch. 615.
(4) (1872) L. R. 7 C. P. 328.
(5) [1896] 2 Ch. 497.
(6) (1866) L. R. 3 Eq. 382.
(7) [1905] 1 Ch. 406, 410.
(8) (1701) Freem. Ch. 249.

and there being in the mansion certain carvings of wood ascribed to Grinling Gibbons which were excepted from the sale. On a former occasion, at all events in the year 1821, if I rightly understand it, an absolute owner of the same property had died intestate, and the articles now in dispute passed without question to the heir as distinguished from the executor and the next of kin. They are part of the original decorations of the walls of the various rooms; they have never left the house since first they were placed there about 200 years ago, though they are not all of them, as I understand, in the original positions in which they were placed. I suppose, though I am not clear about this, that the ninth Earl himself became owner of the mansion and these articles at the same time—at all events they descended to and came to him in and as part of the house.

Now the general rule on such matters is well known and is to be found in the ordinary text-books, and I may take it for convenience from one of the best, namely, Goodeve on the Law of Real Property, 5th ed. p. 24: "By the ancient rule of the common law, expressed in the maxim quicquid plantatur solo, solo cedit, whatever is planted or built in the soil or freehold becomes, in point of law, part of the freehold or inheritance. Thus, as we have seen, a house becomes parcel of the land on which it stands. In like manner anything annexed or affixed to any building (and not merely laid upon or brought into contact with the building) was, by the old common law rule, treated as an addition to the property of the owner of the inheritance in the soil, and was termed a 'fixture.' Where fixtures are annexed by a tenant in fee simple, he can, by virtue of his ownership, disannex and dispose of them as he pleases, but, if he does not, they will devolve with the land on the heir or devisee, as against the next of kin and general legatees, so that the latter have no right to disannex fixtures and treat them as personal chattels. But, by another general rule of the common law, 'whatever once becomes part of the inheritance cannot be severed by a limited owner, whether he be owner for life or for years, without committing that which in the law of England is called waste.' This second rule, however, namely, the irremovability of things fixed to the inheritance, has, from motives of public policy, been

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relaxed first, in respect of ornamental fixtures, secondly, in respect of trade fixtures, and thirdly, by statute, in respect of agricultural fixtures." Again as far back as in the Touchstone, p. 469, it is said, "So an executor or administrator shall not have the incidents of a house (being real estate)"—those words "being real estate" are Mr. Preston's words, it being his edition from which I am reading—"as glass, doors, wainscot, and the like no more than the house itself; nor pales, walls, staulks, fish in ponds, deer, or conies in parks, pigeons in pigeon-houses, or the like."

Then follows Mr. Preston's note, where he says that a general view of the law may be collected from Lord Ellenborough's judgment in *Elwes* v. *Maw* (1)—and the subject is dealt with in the notes there—the accuracy of which, however, in some respects I think has been doubted. With regard to the other ancient writers, the material passages and extracts from them are given in Amos and Ferard on Fixtures, 3rd ed. p. 214.

When it is said that there has been a relaxation of the ancient rule in certain circumstances, by that it is meant not that there has been any alteration in the rule which determines what is or is not a fixture—that really is a mere question of language—but that there has been a relaxation in the rules in certain circumstances as to the right to remove those things which are fixtures. A fixture is a fixture still notwithstanding any relaxation in those rules, and here I may quote what, if I may respectfully say so, I have no doubt is perfectly sound law, namely, what Lord Blackburn, in delivering the judgment of the Exchequer Chamber in the case of *Holland* v. *Hodgson* (2), said: "Perhaps the true rule is, that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to shew that they were intended to be part of the land, the onus of shewing that they were so intended lying on those who assert that they have ceased to be chattels, and that, on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land, unless the circumstances are such as to shew that it was intended all along

(1) (1802) 3 East, 38; 2 Sm. L. C., 11th ed., p. 189.

(2) L. R. 7 C. P. 335.

to continue a chattel, the onus lying on those who contend that it is a chattel."

In *Mather* v. *Fraser* (1) Lord Hatherley, then Vice-Chancellor Page Wood, said (2), speaking of *Fisher* v. *Dixon* (3) in the House of Lords, "It is well expressed in that case, that the principle upon which the old rule of law, that fixtures pass with the soil, was relaxed in favour of trade, has no application where, as here, the parties who affixed the machinery were themselves the owners in fee of the soil. According to the old rule of law, if that which would otherwise have been a chattel had been affixed to the soil, whether by nail, screw, or otherwise, it passed along with the soil to which it had been so fixed. In the relation of landlord and tenant, but in that relation alone, the rule of law was relaxed for the encouragement of trade; it being very early perceived that it would be injurious to trade if a tenant were told that he must contrive to conduct his trade with property which need not be fixed, in any way, to the soil, or he would at once be held to have made a present of it to his landlord; and, accordingly, as between landlord and tenant, questions of some difficulty have arisen, whether, in particular instances, chattels pass with the freehold of the land. But here—and it was the case also as Lord Cottenham observed in *Fisher* v. *Dixon* (3)—no such question can arise. Here, the same parties were owners both of the fee and of the chattels in question. There was no landlord between whom and themselves the question could arise. In the exercise of their own discretion as to the disposition of the property, they fixed certain articles to the soil, and no question of encouragement to trade can arise. Here, therefore, and in all other cases where the owner of the chattel is also the owner of the fee, the Court can at once dismiss from its consideration the entire class of cases in which the rule of law has been relaxed in favour of trade, all such cases presuming the existence of the relation of landlord and tenant." In *Bain* v. *Brand* (4), a Scotch case, although it was not a case of an owner in fee but the case of an owner of chattels, it came to the same thing; it was the case of a heritable lease. There the

(1) (1856) 2 K. & J. 536.
(2) Ibid. 548.
(3) (1845) 12 Cl. & F. 312.
(4) 1876) 1 App. Cas. 762.

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Lord Chancellor (Lord Cairns) said (1): "My Lords, the case therefore being, in my opinion, uncovered by any decision which has settled the law upon the subject"—that was in respect of those particular articles—"I have to proceed to look at it in point of principle. Looking at it in that way, I would remind your Lordships that there are, with regard to matters of this kind, which are included under the comprehensive term of 'fixtures,' two general rules, a correct appreciation of which will, as it seems to me, go far to solve the whole difficulty in this case. My Lords, one of those rules is the general well-known rule that whatever is fixed to the freehold of land becomes part of the freehold or inheritance. The other is quite a different and a separate rule;—whatever once becomes part of the inheritance cannot be severed by a limited owner, whether he be owner for life or for years, without the commission of that which, in the law of England, is called waste, and which, according to the law both of England and Scotland, is undoubtedly an offence which can be restrained. Those, my Lords, are two rules, not one by way of exception to the other, but two rules standing consistently together. My Lords, an exception indeed, and a very important exception, has been made, not to the first of these rules, but to the second. To the first rule which I have stated to your Lordships there is, so far as I am aware, no exception whatever. That which is fixed to the inheritance becomes a part of the inheritance, at the present day as much as it did in the earliest times. But to the second rule, namely, the irremovability of things fixed to the inheritance, there is undoubtedly ground for a very important exception. That exception has been established in favour of fixtures which have been attached to the inheritance for the purpose of trade, and perhaps in a minor degree for the purpose of agriculture. Under that exception a tenant who has fixed to the inheritance things for the purpose of trade has a certain power of severance and removal during the tenancy. What extent of removal the executor of one who is not a tenant, but is a complete owner of the inheritance, may have as against the heir, whether in point of fact he has any right of removal at all, or any right to

(1) 1 App. Cas. 766.

take more than that which really and properly considered was never fixed to the inheritance in a definite way, I need not stop to consider, because"—he goes on to say—"the case of *Fisher* v. *Dixon* (1) has clearly decided by the authority of your Lordships that fixtures of the kind now before your Lordships cannot be removed by the executor of one who is complete owner of the inheritance."

Now I take that to mean that whether or not it be the fact that the executor as against the heir has any right of removal at all, at all events the executor has no right to take more than that which really and properly considered is never fixed to the inheritance in a definite way. That is the view of the law—and of course Lord Cairns is a very great authority—taken by the latest and best of the text-writers. Even in *Norton* v. *Dashwood* (2) it was held that tapestry could not be removed by the executor from a house going to the heir or devisee, and there was a similar decision in *In re Whaley* (3), before Neville J.

In the present case the articles in question were in my opinion undoubtedly fixed in a definite way to the inheritance. In my opinion it cannot be doubted that they were fixtures, and if it be material, as to which I have very much doubt, there is not, in my opinion, and there hardly could be, any ground for seriously suggesting that the owner of Holme Lacy upon the rebuilding some time before 1700 intended that these chattels should not all along form part of the house, or rather there is no ground for suggesting that he intended they should not form part of the house, but continue to be ordinary chattels, or, indeed, that he had any particular intention at all upon the subject. I hold then that these chattels did become and remain part of the house; they could not, in my opinion, have been taken under a fi. fa., and they would, in my opinion, also have passed by a mortgage of the house. It is true that the testator bequeathed to the present Earl absolutely all his plate (except such as he had before given to his wife), books, pictures, and "other works of art or curiosity" (except certain chattels directed to be considered as heirlooms), china, glass, furniture, carriages,

(1) 12 Cl. & F. 312. (2) [1896] 2 Ch. 497.
(3) [1908] 1 Ch. 615.

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horses, wines, and, generally, all goods, effects, and live and dead stock which at his decease might be in or about his mansion house of Holme Lacy. But in my opinion that bequest was not intended in any way to cut down the previous devise of the mansion. I think it merely relates to and comprises articles which are properly chattels and not fixtures in any way.

That being so, I hold that the carvings in question in this case belong to the house and to the inheritance, and that the proceeds of sale of such of them as have been sold must be considered capital money subject to the trusts of the settlement.

Solicitors: *Woodhouse & Davidson; Treherne, Higgins & Co.*

G. A. S.

JOYCE J. 1910 *July* 12, 13; *Nov.* 14; *Dec.* 5.

In re GRIFFITHS' SETTLEMENT. GRIFFITHS *v.* WAGHORNE.

[1910 G. 588.]

Will—Real and Personal Estate—Settlement Fund—Special Power—Absolute Interest in Default of Appointment—"Devise bequeath and appoint"—Trusts for Non-objects of Power—Power and Interest—Intention—Child en ventre sa mère—Wills Act, 1837 (1 *Vict. c.* 26), *s.* 33.

By his "last will and testamentary appointment," the testator, a solicitor, made the following disposition:—"I devise all the remainder of my real estate and bequeath all my personal estate and by virtue of the provisions contained in the settlement executed upon my marriage I appoint the funds subject to the trusts thereof unto my trustees upon trust after payment of my just debts and funeral and testamentary expenses to divide the same equally between my five children"; and the testator directed the shares of two of his daughters to be held by his trustees upon the usual settlement trusts for the daughters for life, with remainder to their children at twenty-one or marriage.

At the time of making his will the testator had under the trusts of his marriage settlement a testamentary power of appointment in favour of the children of the marriage over the funds settled by both his wife and himself, and the trust of the latter fund in default of appointment was for the testator, his executors, administrators, and assigns absolutely. On a summons to determine the effect of the above-mentioned disposition with regard to the testator's own marriage settlement fund and his residuary real and personal estate:—

Held, that the word "appoint" was not used in any narrow technical

and restricted sense as merely exercising the special power of appointment, but that the words of disposition must be read together so as to effect the clear intention of the testator to deal with all the property in question as belonging to him absolutely.

Cox v. *Chamberlain*, (1799) 4 Ves. 631, applied.

After the testator's death a posthumous child was born to one of the residuary legatees who had died shortly before the testator:—

Held, that s. 33 of the Wills Act applied, and that the share passed under the legatee's will.

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By his will, dated June 20, 1904, which he commenced as follows, "This is the last will and testamentary appointment of me Frederick Thomas Griffiths," the testator, who was a solicitor, devised his dwelling-house unto his trustees upon trust for his five children equally as tenants in common absolutely, and the will proceeded: "I devise all the remainder of my real estate and bequeath all my personal estate and by virtue of the provisions contained in the settlement executed upon my marriage dated January 31, 1859, I appoint the funds subject to the trusts thereof unto my trustees upon trust after payment of my just debts and funeral and testamentary expenses to divide the same unto and equally between my said five children" Arthur F. Griffiths, Laura H. Griffiths, Margaret F. Griffiths, Walter H. Griffiths, and Katherine M. Griffiths. The testator directed the shares both original and accruing of his daughters Laura H. Griffiths and Katherine M. Griffiths to be held upon the usual trusts for them for life, and after death for their children who should attain the age of twenty-one years, with a gift over in default of such children to the testator's remaining children living at the death of such daughter.

When the testator made his will his wife was dead, and under the marriage settlement mentioned in the will and in the events which had happened the fund brought into settlement by the wife was held upon trust for the testator for life and after his death for the children of the marriage as he should by will appoint, and a sum of 6000*l.* brought into settlement by the testator was held upon trust as to the income thereof for him for life, and after his death as to the capital upon trust for all or any one or more of the children of the marriage (of whom there

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were then living the five named in the testator's will) as the testator should by deed or will appoint, and in default of any such appointment and subject thereto and so far as the same should not extend in trust for the testator, his executors, administrators, and assigns absolutely.

In 1905 the testator's daughter the defendant Katherine M. Shacklock (formerly K. M. Griffiths) married T. W. Shacklock, and the infant defendant Eric Hepworth Shacklock was the child of the marriage.

Walter H. Griffiths died in 1905.

Arthur F. Griffiths married in April, 1908, and died on September 4, 1908, in the lifetime of his father, the testator, leaving his widow the defendant Kathleen Mary Griffiths enceinte, and having bequeathed one fourth part of his residuary estate to her. The plaintiff Margaret F. Griffiths and the defendant J. Waghorne were the executors of his will.

The testator died on November 9, 1908, and his will was proved by his sole surviving executrix, the plaintiff Margaret F. Griffiths.

On April 29, 1909, the infant defendant Edith Mary Griffiths, the posthumous daughter of Arthur F. Griffiths, was born.

This was a summons by the surviving trustee of the testator's marriage settlement and by the executrix of his will for the determination, inter alia, of the following questions:—First, (*a*) whether the one fifth share of the marriage settlement fund of 6000*l.* purported to be appointed by the testator's will to Arthur F. Griffiths passed to the latter's executors or fell into and formed part of the testator's residuary estate, and (*b*) whether the one fifth share of the testator's dwelling-house and residuary estate devised and bequeathed to Arthur F. Griffiths vested in the latter's executors on the testator's death, or whether there was an intestacy in respect thereof under the testator's will; Secondly, whether the one fifth share of the marriage settlement fund of 6000*l.* purported to be appointed in favour of the defendant Katherine M. Shacklock vested in her absolutely or was validly settled upon her and her children in accordance with the trust thereof declared by the testator's will.

Frederic Thompson, for the plaintiffs, stated the case.

On the first question raised by the summons, relating to the posthumous birth of the infant defendant Edith M. Griffiths :—

Rolt, for the defendant Waghorne, the executor of Arthur F. Griffiths. The testator's son Arthur died in the testator's lifetime, leaving his child, the infant defendant Edith M. Griffiths, en ventre sa mère. Arthur's executors are therefore by virtue of s. 33 of the Wills Act entitled to Arthur's share, inasmuch as the infant defendant must be regarded as living at the death of her father and the testator: *In re Burrows.* (1)

Harman, for the infant defendant Edith M. Griffiths. This defendant is heiress-at-law and one of the next of kin of the testator, and it is to her interest that her father's executor should not take. Having regard to the facts, s. 33 of the Wills Act does not apply. The testator's son Arthur did not leave issue living at his own or the testator's death. I rely on the words of the section and submit that the word "living" should not be strained to extend to an unborn child.

The point turns upon the question of benefit to the infant: *Villar* v. *Gilbey.* (2)

[He was stopped by the Court.]

On the second question raised by the summons, relating to the mode of disposition of the husband's marriage settlement fund:—

Rolt, for the defendant Waghorne. I submit that the testator did not exercise the power of appointment, but intended that the disposition in the will should operate as a gift of the absolute interest which he had in default of appointment.

If the will operates as an execution of the power the obvious intention of the testator will be defeated, because the result will be that the share of Arthur will lapse, inasmuch as s. 33 of the Wills Act does not apply to an appointment under a special power : *Holyland* v. *Lewin* (3) ; *In re Harvey's Estate* (4) ; Theobald on Wills, 7th ed. p. 785. But I submit that this was not an execution of the power, but a disposition of his absolute interest by the testator. On the face of the will it is clear that he intended to make one fund and to deal with it in a way in

(1) [1895] 2 Ch. 497.
(2) [1907] A. C. 139.
(3) (1884) 26 Ch. D. 266.
(4) [1893] 1 Ch. 567.

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which he could not deal with it under his special power. The Court will not defeat that intention for the sake of a technicality, but will hold that the absolute interest of the testator passed "to the end that the main design of the parties may be observed"—Sugden on Powers, 8th ed. p. 344—and "in the manner best adapted to carry out the intention of the parties": Farwell on Powers, 2nd ed. pp. 266, 267. Even if there had been a mere appointment and no disposition of his own estate I should still have submitted that his intention was clear to deal with it as his own.

The gifts which the testator cannot carry out by the exercise of the special power will be fed by his absolute interest: *Cross* v. *Hudson* (1); *Jones* v. *Southall.* (2) There is no distinction in principle between those cases and this.

The form in which the testator has done this is entirely subject to the substance of what he intended to do.

Northcote, for the infant defendant Eric Hepworth Shacklock. I support the last argument. It is "by virtue of the provisions" of the settlement that the testator obtained his absolute interest, and that will be taken in aid of his disposition, for although only the power is expressed to be exercised the plain intention was that the trustees should have the estate—Sugden on Powers, 8th ed. p. 353, s. 21; Farwell on Powers, 2nd ed. pp. 266, 267; *Cox* v. *Chamberlain* (3), which was the case of a deed—and it is easier for the Court to adopt the more liberal construction in the case of a will.

[JOYCE J. referred to Sugden on Powers, 8th ed., p. 357, ss. 30 and 31.]

Maugham, for the defendant Kathleen Mary Griffiths. It is not necessary to reject the word "appoint" because it applies to the wife's settlement fund, which did not belong to the testator in default of appointment. So far as that fund was concerned the testator had to appoint, and he has done so by exercising his power. But his own settlement fund, in default of appointment, formed part of his personal estate, and he looked upon it as his own and dealt with it as his.

(1) (1789) 3 Bro. C. C. 30. (2) (1861) 30 Beav. 187.
(3) 4 Ves. 631.

Harman, for the infant defendant Edith Mary Griffiths. The intention of the testator is clear that this property should pass quacunque via.

C. Tennyson, for the defendant Katherine Mary Shacklock. I submit that the will takes effect as an execution of the power and not as a disposition of the testator's interest. The real question is not whether the daughters whose shares were settled get something or nothing, but whether they take their shares absolutely under the principle of *Hancock* v. *Watson* (1), and not merely life interests in them. The will operated as an execution of the special power of appointment, and that execution failed in respect of Arthur's share, which is consequently divisible amongst the other residuary legatees. Regard must be had to the real state of the facts. When the testator made his will this fund of 6000*l.* was not his property and could not become his indefeasibly until either his death leaving the power unexercised or the release of the power during his life. He did not release the power in his lifetime and he made a will exercising the power, and therefore it cannot be said that the property ever became his own absolutely. If the particular words in question stood alone it would not be open to argument to say that he did not mean to exercise the power.

Cox v. *Chamberlain* (2), *Jones* v. *Southall* (3), and the cases cited in Farwell on Powers, pp. 266 and 267, are entirely different cases from the present, for there the appointor either exercised the power in general terms or, having at the same time both a power over the property and an absolute interest in it, intended to dispose of it, and did dispose of it, quacunque via. But that is not so in this case. All that the testator at the date of his will had in respect of this fund was a power of appointment, and he did all he had to do to make a valid execution of that power.

The present is an instance to which the observations of Farwell J. in *Earl of Lonsdale* v. *Lowther* (4) apply, namely, "If a man has once effectually appointed the property he cannot afterwards grant the same property, either by the same or any

(1) [1902] A. C. 14.
(2) 4 Ves. 631.
(3) 30 Beav. 187.
(4) [1900] 2 Ch. 687, 697.

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subsequent deed, because there is nothing on which the grant can operate." The intent was to exercise the power, and that being so, the instrument does not operate as a grant: *Roe* v. *Archbishop of York* (1); *Roach* v. *Wadham.* (2) It is to this defendant's interest to take under the appointment because she will take absolutely, the attempted settlement being in excess of the power and ineffective.

Rolt in reply. The intention of the testator was to dispose of the property in the way pointed out in his will, and the Court has to carry out his intention, to which effect must be given beyond and even against the literal sense of particular words and expressions: Hawkins on Wills, p. 5; *Towns* v. *Wentworth.* (3) *Roach* v. *Wadham* (2) is commented upon in both Sugden on Powers, 8th ed. p. 359, and Farwell on Powers, 2nd ed. p. 267. It was the case of a Court of law dealing with legal interests.

JOYCE J. The first question in this case is one as to the application of s. 33 of the Wills Act to the case where a son of the testator dies in his father's lifetime leaving a child en ventre sa mère, which child is not actually born until after the testator's death. The testator made his will in 1904. He had a son Arthur, who died on September 4, 1908, leaving his widow enceinte. The testator died a month afterwards, on November 9, 1908, and in due time, namely, on April 29, 1909, the child that was en ventre sa mère at the death of her father as well as at the testator's death was born. She is the defendant Edith Mary Griffiths.

Now s. 33 of the Wills Act provides that "Where any person being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary

(1) (1805) 6 East, 86. (2) (1805) 6 East, 289.
(3) (1858) 11 Moo. P. C. 526.

intention shall appear by the will." The defendant Edith Mary Griffiths is issue of the testator's son Arthur, and she was living although not born at the testator's death, and I do not hesitate to decide that s. 33 applies to such a case. If this be a decision requiring the support of authority, it is to be found in *In re Burrows.* (1) It would be most unfortunate if the law were otherwise, the case being obviously within the mischief intended to be remedied by s. 33.

Another question upon this will arises in this way: By the testator's marriage settlement, dated January 31, 1859, a fund of 6000*l.* was settled upon trust for the testator for life, then for his wife for life,—she died in his lifetime—then in the events which have happened for the children as the husband and wife should jointly appoint, and in default of such joint appointment as the survivor should by deed or will appoint, and in default of appointment, not for the children, but for the husband (i.e., the testator), his executors, administrators, and assigns absolutely. The wife died without joining in any exercise of the joint power of appointment, and thenceforward the fund stood settled subject to the testator's life estate upon trust for the children as he should appoint, and in default of appointment and so far as the same should not extend and subject thereto it was the testator's own.

The testator's will contains a disposition in the following terms: [His Lordship read the disposition in the will, and continued.] The circumstances are peculiar. If the disposition be construed with extreme strictness so that there is considered not to be any disposition of the fund except by the word "appoint" exercising the special power of appointment vested in the testator under the settlement, I should say that a blunder had been made by the draftsman in the preparation of the will. But the real intention of the will to my mind is tolerably plain, and the intention of the testator and of the will as expressed is that the fund should be applied first in payment of his just debts and funeral and testamentary expenses.

That was a result which the testator had full power to effect. To read the expression "appoint" by itself and to read the will

(1) [1895] 2 Ch. 497.

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as merely exercising the special power and doing nothing more and as being the only disposing word operating upon the fund subject to the trusts of the settlement would in my opinion be not to effectuate, but frustrate, the intention of the will.

There are not two disposing clauses, but only one. I see no good reason why the words of disposition should not be read together as in *Cox* v. *Chamberlain* (1), and see Farwell on Powers, pp. 266, 267, and upon the whole I think that the words "and by virtue of the provisions contained in the settlement" have and were only intended to have the effect of making it clear that the testator was disposing not only of his own unsettled property, but also of the funds which he had power to dispose of under his marriage settlement and with which he was entitled to do whatever he pleased.

Consequently I hold that the word "appoint" is not here used in any narrow technical and restricted sense so as to invalidate the expressed object of the disposition taken as a whole and avoid some of the purposes for which the property is expressed to be given. The result appears to me to be the same as if the testator had said in simple language "my mind and will is that all my real and personal property including the fund subject to the trusts of my marriage settlement which I can dispose of shall be held by my trustees upon trust after payment of my just debts," and so on, and that consequently such trusts operate and take effect in every way just as if all the property (and in particular the fund in question) had not been subject to a special power of appointment at all, but had been the testator's own absolute property.

Solicitors: *Field, Emery, Roscoe & Medley, for Griffiths & Waghorne, Cheltenham; McKenna & Co., for W. H. Russell, Cheltenham.*

(1) 4 Ves. 631, 634.

R. M.

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Dec. 6, 7, 8.

[1910 S. 2153.]

Will—Construction—Minority of Tenant in Tail—Trustees to enter—Omission of Words "by purchase"—Receipt and Application of Rents—Surplus Rents to be applied to other Estates — Perpetuities — Implied Estate — Destructibility—Antecedent Estate.

The testator devised four estates, three of which he settled to uses in strict settlement under which an infant was now tenant in tail of the C. estate, and the rents and profits of the fourth estate were to be applied in discharging incumbrances on all the estates. The will contained a provision that if any person who, if this clause had not been inserted, would for the time being be entitled to the possession or receipt of the rents and profits of the C. estate as tenant for life or tenant in tail should be under the age of twenty-one years, then and in such case and as often as the same should happen the trustees of the will were to enter into the possession or receipt of the rents and profits of the estate, and should during the minority of such person keep up the house and manage the property, with power (inter alia) to hold manorial courts and accept surrenders of leases; and should maintain the infant, and apply the surplus rents and profits in the same way as the rents of the fourth estate:—

Held, that the trustees had an implied estate anterior to and taking precedence of that of tenants in tail; that this estate was not destructible and would last during the whole of the limitations contained in the will; that the whole clause was therefore void as infringing the rule against perpetuities; but that the subsequent limitations were not affected.

Browne v. *Stoughton*, (1846) 14 Sim. 369, and *Turvin* v. *Newcome*, (1856) 3 K. & J. 16, followed.

The testator, the seventh Earl of Stamford and Warrington, was possessed of four estates known as the Staffordshire estate, the Leicestershire estate, the Cheshire estate, and the Lancashire estate. He settled the Staffordshire estate and the Leicestershire estate to uses in strict settlement, the details of which it is unnecessary to mention. He settled the Lancashire estate by limiting it to trustees for a term of a thousand years, the trusts of that term being out of the rents and profits to discharge mortgages and incumbrances on the other estates in the following

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order: Staffordshire first, then Leicestershire, then Cheshire, and lastly Lancashire itself. Subject to that term, the Lancashire estate was settled, one moiety to the uses declared of the Staffordshire estate, and the other moiety to the uses declared of the Leicestershire estate. The Cheshire estate, which was the one directly in question, was settled to uses in strict settlement, under which in the events which had happened Roger, the ninth Earl of Stamford, an infant of the age of fourteen years, was now tenant in tail, and he was tenant in tail by purchase. The trusts of the term of a thousand years created in the Lancashire estates were still subsisting. The will contained this provision:

"And I hereby declare my will to be as regards each settled estate that if any person who if this present proviso had not been herein inserted would for the time being be entitled to the possession or the receipt of the rents and profits of such settled estate as tenant for life or tenant in tail shall be under the age of twenty-one years then and in such case and as often as the same shall happen the said Arthur Frederick Payne, Robert Cocks and Henry Hall" (the trustees) "and the survivors and survivor of them and the executors or administrators of such survivor shall enter into the possession or the receipt of the rents and profits of the same settled estate

"And shall during the minority of such person continue such possession or receipt of the rents and profits and repair maintain and keep in proper order and condition the mansion house park gardens woods plantations erections and buildings and stock and keep up the farms and lands or such of them as shall not be tenanted and generally manage or superintend the management of the same settled estate or concur in any of the acts aforesaid

"With full power for the said trustees or trustee for the purposes aforesaid to purchase any horses wagons live or dead stock or any articles or things whatever for the use of the same settled estate or any part thereof and to sell all or any of the same again and to cause the produce of the farms and lands in hand or so much produce as shall not be used thereon for the purposes of the cultivation and management thereof to be sold

in such manner and by such ways and means as they or he shall deem proper and advantageous

" And with full power also for the said trustees or trustee for the time being to fell or cut down any timber that now is or hereafter shall or may be growing upon or within the same settled estate and to employ the same in or for the benefit of the same settled estate or any part or parts thereof or to sell the same and the money to arise from the sale thereof as well as any other money arising under this present trust or provision shall be considered as part of the rents issues and annual profits of the same settled estate and shall be applied accordingly

" And with full power also for the said trustees or trustee for the time being to work and get all or any of the mines quarries and minerals being worked or gotten on the same settled estate and to open and work new mines and quarries and apply the net moneys to arise from such mines quarries and minerals in manner hereinbefore expressed respecting the moneys to arise from the sale of timber

" And with power also for the said trustees or trustee for the time being to hold the courts of and belonging to the several manors comprised in the same settled estate or any of them and for the several purposes aforesaid or any of them to retain or employ from time to time such auditors agents stewards bailiffs gamekeepers and workmen and such domestic and other servants gardeners and labourers upon such terms and with such salaries or wages as the said trustees or trustee for the time shall think proper

" And to make allowances and arrangements with tenants and to accept surrenders of leases and tenancies and out of the rents and profits to pay all the costs and expenses of insurance repairs and other outgoings and all other costs and expenses of care management cultivation and improvement and generally to do or cause to be done all such acts deeds matters and things respecting the care management cultivation and improvement of the same settled estate or to concur in any of the acts and things aforesaid in such manner as they or he could or might do if they or he were the owners or occupiers thereof

" Including power for the said trustees or trustee to make

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such payments or contributions to charitable benevolent or public purposes and to pay such pensions rewards and gratuities to any servant tenant or others employed upon the same settled estate as they or he shall consider reasonable and proper

"And shall from time to time during such minority by and out of the rents and profits of the same settled estate including the proceeds of the sale of produce and of timber and underwood and of minerals pay or discharge the expenses incurred in or about such management or in the exercise of any of the powers aforesaid or otherwise in respect of the premises and all outgoings not payable by any tenant or other person

"And keep down any annual sum or sums of money which may be for the time being charged upon the same premises or any part thereof and the interest of any principal sum or sums of money which may be charged by way of mortgage or otherwise upon the same premises or any part thereof

"And apply any annual sum or sums of money which they or he shall think fit according to the age of such minor (not exceeding the amount hereinafter specified) in or towards the maintenance or education of such minor and do and shall during the continuance of the said term of 1000 years stand and be possessed of and interested in the residue of the rents and profits of the same settled estate if and so far as not already so provided upon the same or the like trusts and for the same or the like ends intents and purposes and with under and subject to the same or the like powers provisions and declarations as are hereinbefore expressed and declared of and concerning the rents and profits of the Lancashire Estate during the said term."

The testator died in 1883. In 1905 the Earl of Stamford's Cheshire Estate Act (5 Edw. 7, c. *3*) was passed, under which the eighth Earl of Stamford was tenant for life of the Cheshire estates subject to a term for 2000 years in trustees, with remainder to the present Earl in tail, with remainder to the uses declared by the will. Nothing in the Act contained was to prejudice, diminish, or affect any of the duties or powers imposed or conferred by the will upon the trustees. The eighth Earl died in 1910 and was succeeded by the ninth Earl, who was an infant.

Questions arose as to the maintenance of the infant and as to the validity under the rule against perpetuities of the direction contained in the will that the trustees should enter and manage the Cheshire estate and apply the surplus rents and profits for the same purposes as those declared concerning the rents and profits of the Lancashire estate; and the trustees of the will took out a summons for the determination of the questions—

(1.) Whether or not the directions in the will contained for entry into and management of the settled estate by the trustees during the minority of an infant tenant for life or tenant in tail thereof and for the application of the rents and profits thereof during any minority for the purposes in the will mentioned or any of them were valid and effectual or were void for perpetuity.

(2.) If the clause was valid and effectual, how and in what order of priority the trustees of the said will should apply the rents and profits of the Cheshire estate; and

(3.) That directions might be given for the maintenance and education of the infant Earl of Stamford out of the rents and profits of the Cheshire estate.

T. H. Carson, K.C., and *A. L. Ellis*, for the trustees of the will. In order to avoid the danger of such provisions being held to be void as infringing the rule against perpetuities it has been generally considered by conveyancers that clauses providing for the receipt and application of rents during minorities should always be limited to the minorities of persons taking by purchase: Davidson's Conveyancing Precedents, 3rd ed. vol. iv. pp. 396, 453; vol. iii. part 2, p. 1047; vol. iii. part 1, p. 465, note; Jarman on Wills, 5th ed. vol. i. p. 238. So many doubts have been suggested on the effect of omitting the words "taking by purchase" that the trustees have felt bound to submit the question to the Court. If this clause is void the surplus rents and profits, after providing for the maintenance of the infant (which has already been arranged), will be held in trust for him under s. 42 of the Conveyancing Act, 1881, instead of being applied in the same way as the rents of the Lancashire estate for the benefit of other people.

Tomlin, for the infant tenant in tail of the Cheshire estate.

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The point is covered by *Browne* v. *Stoughton* (1) and *Turvin* v. *Newcome* (2), in which it was decided that such clauses as this infringe the rule against perpetuities and are void.

[WARRINGTON J. Yes. The onus is on the other side.]

Clauson, K.C., and *H. T. Methold*, for persons interested in the Leicestershire estate. This clause is good and does not come within the principle of *Browne* v. *Stoughton* (1) and *Turvin* v. *Newcome*. (2) It provides for payment of debts, and for that reason it is not obnoxious to the rule against perpetuities: *Briggs* v. *Earl of Oxford* (3); *Lord Southampton* v. *Marquis of Hertford*. (4) It takes nothing away from the tenant in tail except for the purpose of paying debts. If the debts are all paid off the income will belong to the tenant in tail. The person who enjoys the estate has only to pay off the debts and there is an end of the trust. Again, it does not infringe the rule against perpetuities because it would be put an end to by the barring of the estate tail. The legal estate is not vested in the trustees. They would not be the right persons to bring an action of ejectment. Theirs is not an estate which in certain events comes before the estate tail. The clause cannot come into operation at all until a tenant in tail is entitled to possession. It takes away from him something to which he has a right; and that is quite a different provision from those in *Browne* v. *Stoughton* (1) and *Turvin* v. *Newcome* (2), where the trustees had the legal estate and their estate was anterior to that of the tenant in tail. Therefore the tenant in tail can by barring the entail put an end to this power, and the power was valid in its creation: *Lantsbery* v. *Collier* (5); Sugden on Powers, 8th ed. p. 851; Sanders on Uses and Trusts, 5th ed. vol. i. p. 201. An estate after an estate tail, which must vest, if at all, at or before the termination of the estate tail, is never too remote; for there is always some one, namely, the tenant in tail, who can, at any time, destroy it by barring the entail: Gray on Perpetuities, 2nd ed. p. 362. The decisions in *Browne* v. *Stoughton* (1) and *Turvin* v. *Newcome* (2) only apply to clauses by which accumulation is directed,

(1) 14 Sim. 369.
(2) 3 K. & J. 16.
(3) (1852) 1 D. M. & G. 363.
(4) (1813) 2 V. & B. 54.
(5) (1856) 2 K. & J. 709, 717.

and there is no such direction here. So does Mr. Waley's note in Davidson's Conveyancing Precedents, 3rd ed. vol. iii., part 1, p. 465. An accumulation for payment of debts is not within the rule: *Bacon* v. *Proctor* (1); *Bateman* v. *Hotchkin* (2); *Tewart* v. *Lawson.* (3) Doubts have been cast upon the correctness of the decision in *Browne* v. *Stoughton* (4) by Lewis on Perpetuity, Supplement, p. 174, and Gray on Perpetuities, 2nd ed. p. 372. *Ferrand* v. *Wilson* (5), which was relied on in *Browne* v. *Stoughton* (4), was doubted in Farwell on Powers, 2nd ed. p. 110. This estate is in defeasance of and not prior to the estate tail and can be barred by a disentailing deed: *Milbank* v. *Vane* (6); *In re Trevanion.* (7) The tenant in tail, though an infant, could under s. 15 of the Fines and Recoveries Act, 1833, bar the entail, and that event was contemplated by the will: Carson's Real Property Statutes, 2nd ed. pp. 275, 276.

Cave, K.C., and *Sheldon*, for persons interested in the Staffordshire estate. We support the same contention. The only possible objection to this clause is that it is void because it extends to tenants in tail by descent and may operate for any length of time. But the clause is destructible by the tenant in tail, so the rule does not apply. *Browne* v. *Stoughton* (4) and *Turvin* v. *Newcome* (8) were wrongly decided and ought not to be followed. Both decisions were based on the mistaken assumption that the limitations in *Browne* v. *Stoughton* (4) were legal limitations, whereas they were equitable. The learned judges relied on *Marshall* v. *Holloway* (9), in which the trust preceded the estate tail, and *Ferrand* v. *Wilson* (5), in which the trust preceded or was concurrent with the estate tail. The point that the trust for accumulation was destructible was not taken in *Browne* v. *Stoughton.* (4) In *Floyer* v. *Bankes* (10) there is a dictum to the effect that such a clause as this was void for remoteness, but it is founded on *Browne* v. *Stoughton.* (4) [They also referred to *Longfield* v. *Bantry.* (11)]

(1) (1822) T. & R. 31.
(2) (1847) 10 Beav. 426.
(3) (1874) L. R. 18 Eq. 490.
(4) 14 Sim. 369.
(5) (1845) 4 Hare, 344.
(6) [1893] 3 Ch. 79.
(7) [1910] 2 Ch. 538.
(8) 3 K. & J. 16.
(9) (1818) 2 Swans. 432.
(10) (1869) L. R. 8 Eq. 115.
(11) (1885) 15 L. R. Ir. 101

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H. Terrell, K.C., and *Owen Thompson*, for other persons interested in the Leicestershire estate. We take the same view. A somewhat similar clause has been held to be void in *Sykes* v. *Sykes* (1), but that is based on *Case* v. *Drosier* (2), in which the estate was not barrable: Gray on Perpetuities, 2nd ed. pp. 366, 374.

Tomlin, for the infant tenant in tail, in reply. The Court is asked to treat this case as if *Browne* v. *Stoughton* (3) had created an exception to some general rule and that exception ought not to be extended. But *Browne* v. *Stoughton* (3) is only one of a long line of cases which have for many years been held to lay down the principle that this kind of power is in fact bad unless it is limited to tenants in tail by purchase. The point has never been before the Appeal Court, but in a Court of first instance it is not now possible to hold that this power is good. Text-book writers have been referred to, but the limit of their authority is that where there is a proposition of law which is not established by authority the views of the writers may be followed by the Court; their criticisms do not alter the law. The question depends not on the purpose of the trust, but on whether the machinery for carrying it out is invalid because it may, by possibility, go on without limit. The result of the authorities is that these trusts are in fact antecedent to the estate tail and not capable of being destroyed by a disentailing deed, or they are repugnant as being a revesting of the estate tail. A dilemma is created; either they are antecedent to the estate tail and therefore not destructible, or they are a partial defeasance and revesting of the estate tail and therefore repugnant: Fearne on Contingent Remainders, 10th ed. vol. i. pp. 252, 529; *Lade* v. *Holford*. (4) The point is that the trustees have an estate which is antecedent to the estate tail, an unseverable estate, paramount to all the other estates. The Court will imply such an estate in the trustees as is necessary to enable them to carry out the trust: *Dean* v. *Dean*. (5) That estate is prior to all the others and cannot be barred; therefore

(1) (1871) L. R. 13 Eq. 56.
(2) (1837) 2 Keen, 764; (1839) 5 My. & Cr. 246.
(3) 14 Sim. 369.
(4) (1763) Amb. 479; 1 W. Bl. 428.
(5) [1891] 3 Ch. 150, 157.

it is within the rule against perpetuities and is bad, or it is void on the ground of repugnancy. The purpose of this trust is not the owner's interest under this settlement, but it is to provide a fund for paying off incumbrances on estates not included in the settlement, and for a period which cannot be terminated by the tenant in tail. He cannot come into possession of those estates and pay off the incumbrances himself so as to terminate the trust. This is really a trust to accumulate, for accumulation is necessary to enable mortgages to be paid off out of rents; it cannot be done by instalments. It is a trust, not a power, and it includes powers which can only be exercised by the owner of the legal estate, for instance the power to accept surrenders of leases: *Robbins* v. *Whyte*. (1) Trusts for payment of debts are only permissible where the owner can pay off the debts, because he can as owner stop the accumulations under *Harbin* v. *Masterman*. (2) This clause is similar to the one which was held to be void in *Marshall* v. *Holloway* (3), a decision which was approved of in *Christie* v. *Gosling*. (4) If the incumbrances on the other estates are paid off, and the term comes to an end, the surplus rents are undisposed of if the contention of the other side is right. On these grounds the whole of this clause is void for remoteness. It does not depend upon accumulation or the destination of the surplus rents, but the whole clause is bad: Sugden's Law of Property, pp. 347, 348. *Case* v. *Drosier* (5) is an illustration of a clause which failed because the object of the clause was outside the permitted period and the whole provision was void. It is not void in part only: *Ferrand* v. *Wilson* (6); *Scarisbrick* v. *Skelmersdale* (7); *Cochrane* v. *Cochrane* (8); Wolstenholme's Conveyancing and Settled Land Acts, 9th ed. p. 107, note to s. 42 of the Conveyancing Act, 1881; *Berry* v. *Berry*. (9)

J. E. G. de Montmorency, for other persons interested in the Cheshire estate, supported the same contention.

(1) [1906] 1 K. B. 125.
(2) [1894] 2 Ch. 184.
(3) 2 Swans. 432.
(4) (1866) L. R. 1 H. L. 279.
(5) 2 Keen, 764; 5 My. & Cr. 246.
(6) 4 Hare, 344, 376.
(7) (1850) 17 Sim. 187.
(8) (1883) 11 L. R. Ir. 361.
(9) (1878) 7 Ch. D. 657.

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WARRINGTON J. stated the facts and continued:—The question is whether the direction that the trustees in the events mentioned are to enter into possession of the estates is or is not void as infringing the rule against perpetuities by reason of the fact that it is not, in accordance with the usual practice of conveyancers, limited to the minority of tenants in tail by purchase. The infant tenant in tail of the Cheshire estate contends that it is void, and in support of that contention he relies upon two cases. The first of those is *Browne* v. *Stoughton* (1), decided by Shadwell V.-C. in 1846. The second is *Turvin* v. *Newcome* (2), decided by Page Wood V.-C. in 1856. Those two cases have never been overruled, and they are, of course, binding on me if the facts of the present case bring it within the principle upon which those cases were decided, or unless those decisions are manifestly contrary to some well-known principle of law, so that there is in fact a conflict of authority. Now, judging from the universal practice of conveyancers and from the statements made in Jarman on Wills, and in the very learned introduction by Mr. Jacob Waley to Davidson's Conveyancing Precedents, 3rd ed. vol. iii., part 1, those decisions have been generally regarded in the profession for upwards of sixty years in the one case and upwards of fifty years in the other as having determined the question raised by them in favour of the invalidity of such a limitation. It is quite true that *Browne* v. *Stoughton* (1) has been adversely commented on by text-writers of eminence, and in particular by Mr. Lewis in the Supplement to his work on Perpetuities, the edition of 1843, the Supplement itself being published in the year 1849. But of course such comments as those do not render the decision less binding than it otherwise would be upon a judge of first instance. The real question that I think I have to decide is whether the present case falls within those decisions, and whether, as was contended in argument, those decisions, if the case does fall within them, are contrary to any well-known principle of law.

Now the persons interested in the Staffordshire, the Leicestershire, and the Lancashire estates contend that the case does not

(1) 14 Sim. 369. (2) 3 K. & J. 16.

fall within the principle of those two decisions, and also that those decisions are contrary to a well-known principle of law. Those two contentions fall very much under one head, and it is almost impossible to discuss them separately. The second branch of the argument on the part of the persons interested in the other estates is that the purpose of the provision is not accumulation, as it was in *Browne* v. *Stoughton* (1), but payment of charges, an object not in itself objectionable. That second contention I will examine presently.

The first question is, do the cases of *Browne* v. *Stoughton* (1) and *Turvin* v. *Newcome* (2) apply to the present case, and if they do, is the Court bound to follow them? The first point to be dealt with is the construction of the will. In the first place the limitations of the Cheshire estate (I will deal with that alone for the present purpose) are legal limitations. Then comes the clause in question. The clause directs the trustees that if any person who, if this proviso had not been inserted, would for the time being be entitled to possession as tenant for life or tenant in tail should be under the age of twenty-one years, then the trustees should enter into possession or receipt of the rents and profits of the settled estate. Then amongst the powers which are given to the trustees when they have so entered is a power for them to hold manor courts, to accept surrenders of leases and tenancies, and various other powers which do not directly affect the question; and what they are to do with the rent is this: after paying the annual charges, after providing for expenses of management, and so on, and after applying certain sums, the amount of which is limited by the will, for the maintenance of the infant, they are, during the continuance of the term of 1000 years (that is the term not on this estate, but on the Lancashire estate), to stand and be possessed of and interested in the residue of the rents and profits of the settled estate if and so far as not already so provided upon the same or the like trusts, and for the same or the like ends, intents, and purposes, and with, under, and subject to the same or the like powers, provisions, and declarations as were thereinbefore expressed and declared of and concerning the rents and profits of the Lancashire estate during

(1) 14 Sim. 369. (2) 3 K. & J. 16.

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the said term. Now the result of those provisions is that the surplus rents and profits, in truth the entire rents and profits during the period for which the trustees are to hold possession, are taken away altogether from the tenant for life or tenant in tail during whose minority the trustees are to be in possession; because even if the trusts of the term of 1000 years should expire during that minority, still during that period there is nothing given to the tenant in tail at all, and the surplus rents would either pass to the testator's heir as undisposed of, or would pass under any residuary gift which might be contained in his will. The important point is that during the continuance of that possession the tenant in tail is deprived altogether of the rents and profits. He is to have an allowance for maintenance, but that is an entirely different thing.

Now what is the nature of the interest of the trustees under that provision of the testator's will? That question was discussed to some extent in a case before Chitty J. of *Dean* v. *Dean* (1) on a very different will, and the decision itself is of no importance whatever to the present case, but Chitty J. in his judgment discussed the legal operation and effect of clauses for maintenance and advancement where no legal estate is vested in the trustees, that is to say, where the hereditaments are not devised to the trustees for a legal estate in the first instance. In discussing that question he says this (2): "Where no legal estate is vested in the trustees, as is the case in reference to the questions raised in this action, it is necessary, in order to give effect to the clauses as they stand, to imply some legal right or estate in the trustees: unless such an implication is made, the trustees could not execute the power of 'applying' the rents which is conferred upon them, nor could they accumulate the surplus rents according to the direction given to them; nor could they raise the money for advancement. Ought then a legal estate or merely legal powers to be implied? If the former, it would, I apprehend, regard being had to the maintenance clause, be arguable that it was at least a legal estate to arise on the determination of the preceding life estate, and to continue during the respective lives

(1) [1891] 3 Ch. 150. (2) [1891] 3 Ch. 157.

of the children presumptively entitled so long as they were under age in their respective shares, and that such an estate would be a determinable estate of freehold pur autre vie, and sufficient to support the limitation to the minors respectively if construed as contingent remainders. But, in my opinion, to imply an estate in the trustees would be going beyond what is necessary and would not be justifiable, having regard to the other parts of the will where the estates are expressly devised to trustees. I think then"—that is in the case before him—"the right construction is to imply a legal power in the trustees named in the will to enter."

Now, in my opinion, I have in this case just what Chitty J. had not in the case before him. I think in the present case the terms of the will are such that I am driven to imply a legal estate in the trustees arising on the death of the previous holder of the estate in the events which, but for that estate, would bring in the tenant in tail as tenant in tail in possession. The reason why I think that in this case I am bound to imply such an estate is that the provisions attached to this direction obviously indicate that it was the intention of the testator that the trustees should not merely have legal powers, but that they should have the legal estate; and the two provisions which it seems to me make that clear are the direction to the trustees to hold manor courts—that is to say they are treated as lords of the manor compelled to hold and bound to hold the manor courts—and the direction to accept surrenders of leases, because unless they have an estate the surrender of a lease to them would have no effect to merge the lease in the inheritance. In my judgment, then, in this case, unlike the case before Chitty J., there is a legal estate in the trustees.

The next question is, in what order of the limitations does that legal estate come? In my judgment it is plain that it comes before the tenancy in tail. The effect of the will is exactly as if the testator had begun his limitations by limiting the estates to the use that if the person who but for this use would under the limitations after contained be entitled to possession as tenant for life or tenant in tail should be an infant, then the trustees should enter. It is not a direction that during the possession of

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a person entitled to possession as tenant in tail the trustees shall receive the rents, but it is a provision that if a person who would otherwise be entitled to possession shall be under the age of twenty-one years, then the trustees shall enter into possession. That seems to me to give them an estate anterior to the estate of the tenant in tail. Now the next question is, how long does that estate last? The answer to that question is plain, that the estate lasts during the whole of the limitations contained in the will, and takes an active form when any tenant in tail whether by purchase or descent would but for that estate be entitled to possession. It seems to me that it is one estate, taking precedence of all the limitations in tail, but giving active rights and powers to the trustees as each event happens on which the action by the trustees is rendered necessary.

That being in my opinion the construction and effect of the will, I turn to the two cases which have been referred to, to see how far those cases cover the point which I have to determine. The first of these is *Browne* v. *Stoughton* (1), decided, as I have said, in 1846. By the will in that case the testator created equitable limitations, and that is of great importance. That fact was curiously enough misstated by Page Wood V.-C. in *Turvin* v. *Newcome.* (2) He treated it as a case of legal limitations, and I cannot help thinking that he must at the moment of writing his judgment, for *Turvin* v. *Newcome* (2) was a reserved judgment, have looked at the marginal note of *Browne* v. *Stoughton* (1), and not at the statement of the will, for the statement in the marginal note is that the testator devised his estates in trust for certain persons in strict settlement. That of course might be a legal limitation; but when the statement of the will in the report itself is looked at it is quite plain they were equitable limitations. The estates were devised unto and to the use of the trustees in trust for the various persons for life and in tail. It is quite plain, therefore, that they were equitable limitations. The provision which was there in question was this—I read it not from the head-note, but from the statement of the will itself: The will provided that "if any person for the time being beneficially entitled to the possession or to the

(1) 14 Sim. 369. (2) 3 K. & J. 16.

receipt of the rents, issues and profits of any of the estates thereinbefore devised, should be under the age of twenty-one years, the trustees, and the survivor of them and the heirs of such survivor, should, so long as the person entitled as aforesaid should be under that age, receive the rents." Now they received the rents not by virtue of any estate created by this proviso, but by virtue of the legal estate which was already vested in them. They were to receive the rents, they were to apply a competent part for the maintenance of the minor, they were to accumulate the rest, and they were to stand possessed of the accumulations upon trust, stating it shortly, to invest in land to be settled to the uses and upon the trusts thereby limited and declared concerning the estates thereby devised to the trustees and their heirs in trust for the plaintiff in the case for life with remainders over. Now those uses did not infringe the rule against perpetuities; therefore—and this is important—there was nothing in the purpose for which accumulation was directed which was objectionable from the point of view of perpetuities. The case was argued by very learned counsel on either side; Mr. Bethell argued it on the one side for the plaintiff, and Mr. James Parker argued it on the other side; and it was the plaintiff who sought to have it declared that the provision was void. What the Vice-Chancellor said was this; and it certainly is curious that after reading that judgment Wood V.-C. should have treated these as legal devises; he said (1) "The testator, having devised the legal estate in fee to trustees, has directed them to hold it in trust" for persons for life with remainder over in tail. Then he read the provision which I have already read, and continued: "Is it not perfectly manifest, on the face of those words, that, by possibility, the trust may go on without limit?" No doubt it might. On those words during the whole continuation of the fee simple estate vested in the trustees it might be incumbent on them at any time to receive the rents, because there was some person beneficially entitled who was under the age of twenty-one years. Then he goes on to say: "It never occurred to my mind that the case of *Lord Southampton* v. *Marquis of Hertford* (2) was determined with reference to what was to

(1) 14 Sim. 377.

(2) 2 V. & B. 54.

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be done with the fund accumulated: and Lord Eldon's language, in *Marshall* v. *Holloway* (1), is express and clear."

I think it is quite plain that *Browne* v. *Stoughton* (2) determined, not that there was anything in the trusts for accumulation which was obnoxious to the rule against perpetuities, but that the whole provision was obnoxious to it, because the right of the trustees to actual receipt of the rents might arise at any time during the continuance of their possession by virtue of the legal estate which was vested in them. I shall come back to that presently on another point, but I think it convenient now to refer to *Turvin* v. *Newcome*. (3) *Turvin* v. *Newcome* (3) was in some respects very much like *Browne* v. *Stoughton* (2), although Wood V.-C. thought it differed, but, as I have said, he was mistaken in that idea. Now in *Turvin* v. *Newcome* (3) the facts were these: there was a devise of real estate to trustees in fee, that is to say they took the legal estate in trust for persons in strict settlement, and there was a direction to the trustees during the minority of any person or persons taking any estate or interest in the said hereditaments under the limitations of the will that the rents to be received by the trustees should be applied for the maintenance of the infant and for expenses of management, and so on, and then they were to be accumulated, and the accumulations held upon the same trusts as the estate. There again the purpose of the accumulation was not in itself obnoxious to the rule against perpetuities; and in that case again it was held that the trust was void.

Now that case was decided in 1856, subsequently to the appearance of Mr. Lewis's Supplement to his work on Perpetuities in which *Browne* v. *Stoughton* (2) had been adversely criticized. The cases cited, so far as appears by the report, were *Marshall* v. *Holloway* (1), which had been cited also before Shadwell V.-C., and *Browne* v. *Stoughton* (2) itself, but in this case it is important to notice that Mr. Cairns, who appeared for the defendant, contended, as it was not contended in *Browne* v. *Stoughton* (2), so far as the report throws any light on the matter, that the proviso was good because it could be barred by

(1) 2 Swans. 432. (2) 14 Sim. 369.
(3) 3 K. & J. 16.

any tenant in tail. Now I think that contention is obviously founded on the remarks of Mr. Lewis in his Supplement, because that was the main ground upon which he based his criticism of *Browne* v. *Stoughton*. (1) The Vice-Chancellor made a remark in answer to that argument which is not very intelligible as it is reported, but I think what he meant was that the power to the trustees in this case was a power not engrafted on the estate tail, but a power collateral to their own estate, namely, the estate in fee which they took by virtue of the limitations in the will. He does not again refer to that matter, and he says this in his judgment (2): "It seems to me, that this case has been determined by *Browne* v. *Stoughton*. (1) Perhaps, however, it is somewhat less strong in one respect. In *Browne* v. *Stoughton* (1) the legal estate was limited in strict settlement. Here the legal estate is vested in trustees. It was argued that all that is directed by this testator is that which the Court would direct the trustees to do during the minority of the parties who are entitled respectively to receive the rents and profits. They are to take what is called the surplus after the necessary allowances and payments, whatever they may be, and they are directed to invest it; and so far I accede to the argument, that, the property being rents, this would give absolute interests to those cestuis que trust who are interested as tenants in tail. It was then argued, that, therefore, the object and destination of the property, when accumulated, would fall within the limits assigned by law; and in that I do not follow the argument entirely. It is not so; because there is no doubt that here, although the accumulations during his time would belong to each successive tenant in tail, and would not go over from one tenant in tail to the next, and the like, still the trust is declared to arise during every successive tenancy in tail, and, in this respect, it is the same as in *Marshall* v. *Holloway* (3) and *Lord Southampton* v. *Marquis of Hertford*. (4) It is true, that the destination of the money is not carried over from one tenant in tail to the next, as it was in those cases, until some tenant in tail attained majority; but

(1) 14 Sim. 369.
(2) 3 K. & J. 18.
(3) 2 Swans. 432.
(4) 2 V. & B. 54.

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there is a positive trust for accumulation fixed upon this property during the whole period, while the successive cestuis que trust are under age; and it has been settled that this exceeds the limit which the law will permit for the duration of such a trust. The Vice-Chancellor in *Browne* v. *Stoughton* (1) observed 'that it did not, in his judgment, depend upon what the destination of the fund was, but upon the legality of the constitution of the trust'; and the argument that this is no more than what the Court would order, has been often used unsuccessfully." Then he refers to the judgment in *Thellusson* v. *Woodford* (2), which I do not think I need refer to. He concludes his judgment by stating that "the case has been extremely well argued by counsel for the trustees, and of course they will be in a position to communicate to the cestuis que trust what is the decision of the Court." That is in reference to the suggestion that the cestuis que trust were not there. Now one cannot suppose that every point which could have been made in order to induce the Vice-Chancellor not to follow *Browne* v. *Stoughton* (1) would not have been made by two such counsel as argued the case extremely well for the trustees. Yet Wood V.-C., notwithstanding that argument, deliberately followed *Browne* v. *Stoughton* (1) and applied it, because he thought that *Browne* v. *Stoughton* (1), though stronger than the case before him, was still rightly decided.

Now do those cases cover the present case? It is said they do not, because in both of them the question before the Court was the question of accumulation and accumulation only, and that it was determined that the trusts for accumulation were void. In my judgment that is a misapprehension. What was declared void was, in both cases, the trust in the performance of which it would be the duty of the trustees to accumulate; it was the trust itself which was declared void. So it is in the present case. If I am right on the construction of the will, that which is void is the unlimited estate vested in the trustees by virtue of which their duties to dispose of the rents arise—not the mode in which they are to dispose of the rents, but the trust itself.

(1) 14 Sim. 369

(2) (1799) 4 Ves. 227, 320.

A further contention with reference to those cases is that a well-known principle of law was ignored by the two learned judges who decided them, that principle being this, as stated by Mr. Lewis in his Supplement, p. 176. He says "between limitations in fee simple and in fee tail there is the essential distinction, that (although the latter are of inferior rank) there is incident to every estate tail a right to put an end to or destroy all limitations and estates created either in defeasance of or by way of remainder after the estate tail." He goes on on the next page, p. 177, to say: "It belongs to the essence of a perpetuity that it is indefeasible—that there is nothing but the contingency in the event on which it is limited, to render otherwise than certain the prospect of it actually arising. Therefore, the law steps in and says, that the event shall be a proximate one and certain to happen, if at all, within a definite period. But when the limitation is destructible by virtue of the power which the law confers upon the tenants in tail entitled under the settlement, it is immaterial to inquire whether the event on which the executory gift depends, regarded abstractedly from its situation with reference to other estates in the settlement, is certain to happen, if at all, within the definite period prescribed in ordinary cases. The essence of a perpetuity is wanting, and, accordingly, a perpetuity there is not in such a case." Now the existence of that principle, of course, is perfectly well understood by every lawyer, and Mr. Lewis proceeds to criticize *Browne* v. *Stoughton* (1) on the ground that it was applicable to that case, and had not been applied to it by the Vice-Chancellor. Strangely enough, Mr. Lewis makes the same mistake with regard to *Browne* v. *Stoughton* (1) that Wood V.-C. made. He refers to *Browne* v. *Stoughton* (1) as a devise of land to trustees—not to the use of trustees, but to trustees—upon trust for the persons in succession, and having thus stated the will he proceeds to contend that the principle to which I have referred was applicable to the case, and had not been applied to it by the Vice-Chancellor. But it seems to me that when *Browne* v. *Stoughton* (1) is looked at with a view to that argument the principle of law referred to does not apply to

(1) 14 Sim. 369.

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it, and for this reason, that the trust vested in the trustees was not destructible by the exercise by the tenant in tail of his right to disentail. The tenant in tail had only an equitable estate, and by disentailing the estate he would only have barred the equitable entail and any equitable executory limitations and powers grafted on it. He would have left the estate in the trustees with its incidents where it was, and it was by virtue of that estate that the trustees were directed to receive the rents. It is perfectly true that by constituting himself equitable owner in fee simple he could have directed the trustees to pay the rents to him, but that is not the point. The destruction of the estate by the exercise of the right of a tenant in tail to disentail is a highly technical matter, and what has to be found is the actual destruction in point of law of the limitation, or the condition, or the power, or whatever it may be. The fact that the limitation, or the condition, or the power, does not, in the events, become operative is another matter altogether. The same remarks are applicable to *Turvin* v. *Newcome.* (1) For the same reason as in *Browne* v. *Stoughton* (2) the act of the tenant in tail disentailing the estate would not destroy the estate of the trustees and would not destroy the incidents to it. It seems to me, therefore, that the criticisms which have been offered both in that learned work to which I have referred and here at the Bar upon those two cases are not well founded. They profess to be founded on two previous cases of *Lord Southampton* v. *Marquis of Hertford* (3) and *Marshall* v. *Holloway.* (4) Those were both cases in which the direction or the power in question was incident to an estate antecedent to the estate of the tenant in tail, and it is obvious, I think, that it is that fact which is at the foundation of the decisions in *Browne* v. *Stoughton* (2) and *Turvin* v. *Newcome.* (1) It was considered that those cases fell under that particular head, namely, of a limitation antecedent to the estate tail, and, therefore, not capable of being barred by it. It is unnecessary to refer to the two cases of *Briggs* v. *Earl of Oxford* (5) and *Lantsbery* v. *Collier* (6), both of which were

(1) 3 K. & J. 16.
(2) 14 Sim. 369.
(3) 2 V. & B. 54.
(4) 2 Swans. 432.
(5) 1 D. M. & G. 363.
(6) 2 K. & J. 709.

decided after *Browne* v. *Stoughton* (1), but before *Turvin* v. *Newcome* (2), but in both of which the limitation in question was not antecedent to, but engrafted on, the estate tail, and therefore destructible by the destruction of the estate tail itself. In my judgment, according to the true construction of this will, there is vested in the trustees an estate limited to continue for an indefinite time, taking precedence of all the estates both for life and in tail limited by the will, and not capable of being destroyed by the tenant in tail, and therefore not protected by the rule of law applicable to destructible estates.

It has been said that I cannot come to that conclusion because I am bound by, and of course I am bound by, the provisions of the Fines and Recoveries Act, 1833, s. 15, which declares that the execution of a disentailing deed shall destroy all estates which are to take effect in defeasance of an estate tail. In my judgment the estate which I find to be vested in the trustees here is not in defeasance of the estate tail. Something in defeasance of an estate means something which defeats or affects an estate which has been previously limited. The estate of the trustees in this case is not in defeasance of the estate tail, but it is antecedent to it. In my opinion, therefore, neither by the Fines and Recoveries Act, nor by authority, am I justified in holding that this provision could be defeated by an exercise by the tenant in tail of his legal right.

Then the further question arises, assuming that is so, does the clause infringe the rule against perpetuities? In my opinion that is plain. It is an estate which is to continue, according to the true construction of the will, so long as any tenant in tail is under the age of twenty-one years. I am not at liberty to consider events which have happened or which might happen. All that I have to do is to construe the will and see whether the will so construed contains a provision which is contrary to the law against perpetuities. This provision plainly is.

But then it is said—and now I come to the second point made by the persons entitled to the Staffordshire and Leicestershire

(1) 14 Sim. 369. (2) 3 K. & J. 16.

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estates—that in this case the purposes of the trusts are not accumulation, and that all that *Browne* v. *Stoughton* (1), held was that the trusts for accumulation were void. I do not take that view of *Browne* v. *Stoughton* (1) at all. I think that both *Browne* v. *Stoughton* (1) and *Turvin* v. *Newcome* (2) determined that the whole provision was void because the duties of the trustees were to arise, or might arise, at a period outside the legal limit, and that neither of the two learned judges who decided those cases was thinking of the purpose for which the trustees were to enter, namely, accumulation. But even if it is material to look at the purposes for which the rents are to be disposed, in this case they are not in the least such as were the purposes described in the cases referred to on this point by counsel for the parties interested in the Staffordshire and Leicestershire estates. The two cases which were most relied upon were *Bacon* v. *Proctor* (3) and *Bateman* v. *Hotchkin* (4), and all that those cases decided was that where the purposes of a trust for accumulation, not in itself obnoxious to the rule against perpetuities, were the payment of charges on the estate, the rents of which were being accumulated, that was a legal purpose; and of course it is, because it is a purpose for the benefit of the person entitled to the estate, and if he is the owner of the estate he can put an end to it at any time by paying the debts himself. But the purposes here are not for the benefit of this estate at all, and the owner of this estate could not put an end to them. They are for the benefit of the other estates, and not only that, but the whole residue of the rents is taken away, notwithstanding that the term of a thousand years may have expired. It seems to me that the provisions of this clause do not come within the saving of such cases as those which have been relied upon. In my opinion, for the reasons I have stated, not merely the trusts affecting the destination of the rents, but the whole provision creating, as it does, an estate of unlimited duration in the trustees antecedent to the limitations to the tenants for life and tenants in tail, is void as infringing the rule against perpetuities. This, however, will not affect the validity of

(1) 14 Sim. 369.
(2) 3 K. & J. 16.
(3) T. & R. 31.
(4) 10 Beav. 426.

the subsequent limitations of the settled estates contained in the will.

WARRINGTON J.

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STAMFORD AND WARRINGTON (EARL), *In re.*

PAYNE *v.* GREY.

Solicitors: *Bower, Cotton & Bower; Trower, Still, Parkin & Keeling; Foyer & Co.; Maples, Teesdale & Co.; Smith, Fawdon & Low, for Wright, Son & Aysom, Leicester; Gamlen, Bowerman & Forward.*

H. C. R.

NEVILLE J.

1910

Dec. 14.

In re BROADWOOD.

LYALL *v.* BROADWOOD.

[1910. B. 523.]

Will—Specific Legacy—Part of Specific Legacy applied in Payment of Debt—Marshalling—Compensation out of Residuary Estate—Legacy contingent on Legatee's attaining twenty-one—Time at which Value to be ascertained—Legacy given to Trustee for Legatee—Income.

B. gave all his shares in a company to his son if he had attained twenty-one at B.'s death, and if not to a trustee in trust to transfer them to his son when he had attained twenty-one. The son was an infant at B.'s death. The executors with the sanction of the Court transferred some of the shares to a creditor in payment of a debt. The son afterwards attained twenty-one. The shares had fallen in value:—

Held, that the son was entitled to compensation out of B.'s residuary estate for the shares so transferred, but for the purpose of compensation the value of the shares must be ascertained as at the date when the son attained twenty-one.

Held, also, that it made no difference in this respect that the shares were given to a trustee and not directly to the son, and the son was entitled to the income received from the shares from the death.

JAMES H. T. BROADWOOD by his will, dated March 8, 1895, after giving to each of his two daughters a legacy of 10,000*l.*, in exercise of a power contained in the partnership deed of John Broadwood & Sons, nominated his son Evelyn H. T. Broadwood if he should have attained twenty-one to succeed on the testator's death to all his shares in that partnership, and gave all the residue of his real and personal estate to trustees upon trust, subject to payment of his debts, funeral and testamentary expenses, and legacies, for his said son absolutely. By a codicil dated November 25, 1902, after reciting that the firm of

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John Broadwood & Sons had been turned into a limited company in which he held a number of ordinary shares, the testator directed his executors to transfer all his ordinary shares to his said son if he should have attained the age of twenty-one years at the testator's death, and if his said son should be a minor at his death to transfer the said shares to Selwyn Robert Pryor, one of his executors, upon trust for his said son if and when he should attain the age of twenty-one years. These directions were given in exercise of special powers in the articles of association.

The testator died on January 22, 1903. The said Selwyn Robert Pryor shortly afterwards renounced probate and disclaimed all trusts of the will.

The testator was at his death entitled to 23,727 fully-paid ordinary shares in the company. He was also liable to repay to the trustees of his marriage settlement a sum of 35,000*l.*, balance of a sum which had been raised on mortgage of the settled estates, called the Lyne estates, with a provision that the testator should be primarily liable for its repayment. It then appeared that the estate of the testator, apart from the shares specifically left in trust for his son, would be insufficient for the payment of this debt. By arrangement with the settlement trustees, 9031 of the shares so left were, with the sanction of the Court, transferred to the trustees, at the price of 17*s.* 6*d.* per share, towards discharge of the debt of 35,000*l.*, and the residue was paid out of the testator's residuary estate.

In the months of November and December, 1908, the sole surviving executor of the testator purchased 750 shares in John Broadwood & Sons, Limited, at 5*s.* each. These shares were offered to him under special provisions in the articles of association for preventing shares being sold to outsiders, and were bought on behalf of the testator's estate, though at the time paid for by the executor. This purchase had afterwards been approved by the Court.

The testator's son attained the age of twenty-one years on April 22, 1907, and thereupon became entitled to possession of the Lyne estates. By this time other property had accrued to the testator's residuary estate, but not sufficient to pay the

daughters' legacies in full. The ordinary shares in John Broadwood & Sons, Limited, were then practically unsaleable, but were valued at 5*s.* a share.

It was proposed to transfer to the testator's son the 750 shares purchased as above mentioned by the executor, in part satisfaction of the shares specifically bequeathed to him and transferred to the Lyne trustees.

This summons was taken out by the surviving executor of the testator's will for the determination of the questions how the testator's son ought to be compensated for the loss of the remaining 8281 of the said shares which were applied in discharge of the testator's debts, whether on the basis of their value (1.) at the end of one year from the testator's death, or (2.) when he attained twenty-one, or (3) on the basis of the price actually realized for the said shares; and whether he was entitled to any and what compensation in respect of the 750 shares, which had also been applied in payment of debts but were replaced in December, 1908.

Horsley, for the trustee.

Jenkins, K.C., and *Leverson*, for the testator's son. The rule is well established that any legatee, and still more a specific legatee, whose legacy has been applied in payment of a debt payable out of real or general personal estate has a right to have the assets marshalled and to stand in the place of the creditor: *Tipping* v. *Tipping* (1); *Burton* v. *Pierpoint.* (2) The principle of marshalling is always that the disappointed legatee stands in the shoes of the creditor; the son therefore is entitled to be paid out of the general personal estate the amount of the creditor's debt which has been satisfied out of his shares. That these shares have declined in value since the creditors took them can have no effect on the specific legatee's claim. The general estate has benefited. Every form of order where there is marshalling is based on that principle: Seton on Judgments, 6th ed. p. 1663; Jarman on Wills, 6th ed. p. 2093.

The son is entitled to the income received from the shares from the testator's death, because the legacy must be deemed to

(1) (1721) 1 P. Wms. 729. (2) (1722) 2 P. Wms. 78, 80.

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be set apart. The executors had no right to use it for payment of debts until the general estate was exhausted: *Clarke* v. *Earl of Ormonde.* (1) The time for valuation of a specific legacy is the death: *Fielding* v. *Preston.* (2)

The legacy is given to a trustee for the son. At law the trustee and not the son is the specific legatee. The shares ought to have been transferred to the trustee at the death, and therefore the value must be ascertained at that date.

Peterson, K.C., and *Sargant*, for the daughters. The legacy is contingent. We do not dispute that the son is entitled to the income actually received. The principle of marshalling in these cases is that the legatee is not to be disappointed by the action of a creditor: *Aldrich* v. *Cooper.* (3) The question is what is he disappointed of? In this case he can only be disappointed of the shares, and as they could not be transferred to him until he attained twenty-one he could only get their value at that date; that is what he is disappointed of and must be compensated for. In *Morley* v. *Bird* (4) the value of a specific legacy of stock was directed to be ascertained as at the expiration of one year from the testator's death, i.e., the date when it ought to have been transferred. The legatee's right is to have his legacy redeemed, or, if that is impossible, to have compensation to the amount of his legacy, not to the amount for which it has been pledged, or taken by the creditor: *Bothamley* v. *Sherson.* (5) The compensation is only making up what the legatee has lost. If the legacy is payable at the death the value must be taken at that time, if afterwards at the time when it is payable.

Jenkins, K.C., in reply.

NEVILLE J. On the general principle that has to be applied to this case I think there is no doubt that where the creditors have resorted, for the satisfaction of their debts, to a fund which is not primarily liable to satisfy them, the owner of that fund is entitled to stand in the shoes of the creditors for

(1) (1821) Jac. 108.
(2) (1857) 1 De G. & J. 438.
(3) (1803) 8 Ves. 382; 1 Wh. & T. L. C. 7th ed. p. 36.
(4) (1798) 3 Ves. 628, 632.
(5) (1875) L. R. 20 Eq. 304, 314.

the purpose of compensation, and, of course, where you are dealing with a pecuniary legacy, the compensation cannot vary from the amount of the fund exhausted by the creditors. Where you have to deal with a specific legacy, a different question arises, but you still undoubtedly have the right, where your specific legacy has been resorted to for the payment of debts, to be put in the same position as though the creditor had satisfied his debt out of the fund primarily liable. The only question is, to what extent does that compensation go? Are you entitled under any circumstances to be put into a better position than you would have been in if the creditor had never resorted to your legacy at all? I do not think that you are. I think that in that case you have to consider what it is that the legatee was disappointed of. In the present case, if the son had attained the age of twenty-one years before the testator's death, he would have been disappointed of the transfer of these shares upon his attaining twenty-one, and, therefore, so far as the shares could not be transferred to him on his attaining twenty-one, he would require compensation out of the general estate, and that compensation would be measured by the loss to him at the date when he is entitled to the transfer; that is the value of the shares which have been sold for the purpose of the payment of debts, at the date of his attaining his right to the enjoyment.

Now comes this question: Does it make any difference that here the fund was directed by the will to be transferred to a trustee, the beneficial interest being still contingent upon the son attaining the age of twenty-one? Upon consideration I do not think it does, and for this reason, that I am dealing solely with an equity, and I think what I have to consider is the loss sustained by the beneficiary, and not the loss, if there could be such a thing, which the trustee could assert in equity. The trustee is merely the hand to hold the legacy until the happening of the contingency in question, and what I have to look at is how far the beneficial legatee was disappointed, and I think he was only disappointed to the extent to which the shares could not be transferred to him.

That being so, I have to consider the position. The estate holds 750 shares which it is in a position to transfer, and I

NEVILLE J. 1910 BROADWOOD, *In re.* LYALL *v.* BROADWOOD.

think upon the transfer of those shares the obligation to the legatee would be pro tanto satisfied. With regard to the balance of shares sold for the purpose of the payment of debts, I think the legatee must be entitled to a sum equal to the value of those shares when he attained twenty-one, and I think he is also entitled to any dividends paid in respect of the period from the testator's death.

Solicitors: *Oliver & Lyall; Atkey, Clarke & Atkey.*

J. R. B.

NEVILLE J. 1910 *Dec.* 14, 15.

In re THYNNE.
THYNNE *v.* GREY.

[1910 T. 1422.]

Bill of Sale—"Personal Chattels"—Settled Heirlooms—Trustees—Tenant for Life and Reversioner—Mortgage of Heirlooms by Reversioner—Non-registration—"Choses in Action"—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *ss.* 3, 4—*Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 3, 8.

Where chattels are settled as heirlooms either by a direct gift to one for life with remainder to another, or by an assurance or bequest upon trust for one for life with remainder to another, the interest of the reversioner in the chattels, whether legal or equitable, is a "chose in action" within the meaning of the exception in s. 4 of the Bills of Sale Act, 1878. Therefore a mortgage by the reversioner of his legal or equitable reversion in the chattels is exempt from the operation of the Bills of Sale Acts and does not require registration under those Acts.

In re Tritton, (1889) 61 L. T. 301, followed.

ADJOURNED SUMMONS.

Lord John Thynne, who died in 1881, by his will bequeathed the diamonds and family pictures and treasures of various kinds inherited from his uncle Lord Carteret and the old family jewels presented to him or his late wife by Lady Caroline Thynne, especially the Essex ring, the Harley ring, the enamel miniatures, and the Sèvres china vases, unto trustees upon trust to allow the same to be used and enjoyed so far as the rules of law and equity would permit by the person or persons who under or by virtue of the limitations contained in an indenture of settlement dated

June 25, 1864, and another indenture dated June 29, 1864, should for the time being be entitled to the receipt of the rents and profits of the hereditaments thereby settled for any estate of freehold or inheritance, but so nevertheless that the same should not vest absolutely in any person thereby made tenant in tail by purchase unless such person should attain the age of twenty-one years.

Under the said indentures of settlement certain real estates stood limited at the death of the said testator to the use of Francis Thynne for life with remainder to the use of his son Bevil Thynne (an infant) in tail male.

In April, 1888, Bevil Thynne attained the age of twenty-one years, and on November 28, 1890, he executed a mortgage whereby as beneficial owner he assured "all his reversionary interest to which he was entitled under the said will of the said testator expectant upon the decease of his father the said Francis Thynne consisting of estates in" Bedfordshire and Cornwall "and also all other his interest of whatever nature that he was then or might thereafter become entitled to under any settlement or will" by way of mortgage to secure the repayment of the sum of 2000*l.* with interest thereon at the rate of 30 per cent. per annum.

In 1891 Bevil Thynne was adjudicated a bankrupt, and he was still an undischarged bankrupt. The trustee in his bankruptcy was the defendant Grey.

Francis Thynne died in January, 1910, and the question then arose as to who was entitled to the said chattels bequeathed as heirlooms by the said will of the said testator, and the trustees of his will took out a summons to determine the question.

B. Farrer, for the trustees.

Jenkins, K.C., and *J. G. Wood*, for the trustee in bankruptcy. The language of the mortgage is wide enough to pass whatever interest the bankrupt had in the chattels, and the question is whether that assignment is a bill of sale and void for non-registration under the Bills of Sale Acts. The definition of a bill of sale is contained in s. 4 of the Act of 1878. It excludes "choses in action," but that expression refers to a legal chose in action. This is not a legal chose in action, but an equitable interest in

NEVILLE J. personal chattels, and the assignment is void under the Act of
1910 1882.

THYNNE, *In re.* THYNNE *v.* GREY

Upjohn, K.C., and *Underhill*, for the mortgagee. These chattels were settled by reference to the limitations of real estate. There was a life tenant, and the mortgagor, the first tenant in tail, did not come into possession till 1910. At the time when the mortgage was executed he had only an interest by way of executory gift in the real estate and no interest at all in the chattels, for no such interest can exist in chattels. Where chattels are settled there is no interest in any one except the trustee or the first person who takes the beneficial interest. "Choses in action" are expressly excluded by s. 4 of the Bills of Sale Act, 1878. If this executory gift is legal, this interest is a legal chose in action; if equitable, it is an equitable chose in action; and in such a case the tenant in tail could file a bill to restrain the tenant for life from selling the chattels. There is no difference in the rules of law and equity as to personal chattels, which are either choses in possession or choses in action. Here the interest of the mortgagor was not an interest in possession. The point is really covered by the decision of Wills J. in *In re Tritton*. (1) The Acts strike at assurances of personal chattels of which the grantor has possession at the time when the deed is executed, and the expression "capable of complete delivery by transfer" means capable of such delivery at the time of the execution of the deed: *Brantom* v. *Griffits* (2); *Thomas* v. *Kelly*. (3) The term "choses in action" includes all personal chattels that are not in possession: *Colonial Bank* v. *Whinney* (4); *Torkington* v. *Magee* (5); The Laws of England, vol. iv. s. 769.

Jenkins, K.C., in reply. The term "capable of complete delivery by transfer" refers to things that are personal chattels and not to the title of the person who owns the things. At the date of the mortgage the chattels were capable of delivery by transfer, although, no doubt, the grantor was not in a position to give immediate delivery because of the interest of the tenant

(1) 61 L. T. 301.
(2) (1876) 1 C. P. D. 349.
(3) (1888) 13 App. Cas. 506, 518.
(4) (1886) 11 App. Cas. 426, 440
(5) [1902] 2 K. B. 427, 430.

for life. "Choses in action" has a technical meaning, and in s. 4 of the Act refers to an interest in respect of which you can bring an action, such as a debt. Assuming that the grantor had an equitable interest in these chattels, the mortgage by him giving a right in equity to the chattels was a bill of sale. Further, the definition of "apparent possession" in the section includes this mortgage, and it is submitted that the decision in *In re Tritton* (1) was wrong.

NEVILLE J. I think that the only question I have to consider is whether the present case can be distinguished from that of *In re Tritton* (1), decided by Wills J. in 1889, which is precisely on all fours with this case, with the exception that there the will gave the chattels directly to one for life and after his death to another; while here the will vests the chattels in trustees for one for life and afterwards to another. The question is whether the decision in the case of a direct gift of chattels to one for life and afterwards to another being to the effect that the interest of the reversioner is a chose in action, the interposition of a trustee alters the case. I do not think it does. I think it makes only this difference, that in the one case you have a legal chose in action and in the other case an equitable chose in action, but in both cases the thing is not a chose in possession but a chose in action. I think, therefore, I ought to follow that decision and hold that this mortgage is not a bill of sale registrable under the Bills of Sale Acts.

Solicitors: *Farrer & Co.; Tarry, Sherlock & King; Burchell, Wilde & Co.*

(1) 61 L. T. 301.

H. L. F.

PARKER J.
1910
Nov. 7, 8, 9, 21.

FABERGÉ *v.* GOLDSMITHS' COMPANY.

[1909 F. 651.]

Plate—Assay—Hall Mark—Foreign Enamels on a Gold or Silver Base—Chain Watch-Bracelets — Plate (Offences) Act, 1738 (12 *Geo.* 2, *c.* 26), *ss.* 2, 6 —*Customs Act*, 1842 (5 *& 6 Vict. c.* 47), *s.* 59—*Revenue Act*, 1883 (46 *& 47 Vict. c.* 55), *s.* 10—*Hall-marking of Foreign Plate Act*, 1904 (4 *Edw.* 7, *c.* 6), *s.* 1.

The word "plate," as used in ss. 2 and 6 of the Plate (Offences) Act, 1738, s. 59 of the Customs Act, 1842, s. 10 of the Revenue Act, 1883, and the Hall Marking of Foreign Plate Act, 1904, includes every article of gold or silver imported from abroad which, if it had been made in the United Kingdom, would have been subject to the provisions as to assaying and marking contained in the Act of 1738.

Where an article—such as a match-box, cigarette case, or letter clip —is once a "manufacture of gold or silver," within the meaning of that term as used in the Act of 1738, it does not cease to be such because it is used as the base or foundation of enamel work, however great the artistic merit of that work is as compared with the value of the gold or silver.

Enamel worked on a gold or silver foundation—even if it is a jewel—is not "set" in the gold or silver within the meaning of that word as used in s. 2 of the Act of 1738.

An enamelled gold cigarette case, the enamel of which is worked on the gold foundation (even if an enamel is a "jewel"), is not "set" in the gold within the meaning of that word as used in s. 6 of the Act of 1738.

Gold watches which are jewelled and set in gold chain bracelets are not exempt from being hall-marked.

The plaintiff, P. C. Fabergé, carried on at St. Petersburg the business of designing and manufacturing articles of jewellery, fantasy, or virtù, which for the most part were articles inlaid with enamel, or adorned with precious stones, on a foundation or base of gold or silver. He had a branch office in London for sale of the articles, which were completed at St. Petersburg before being consigned for sale at the London office.

In July, 1908, a packet containing articles so designed and manufactured was sent from St. Petersburg to be delivered at the London branch office, but on arrival in London the Customs authorities handed it to the Goldsmiths' Company, which is a guild or corporation "with divers privileges confirmed and

enlarged from time to time by divers statutes and by several charters, amongst other things, for the searching, assaying, marking and regulating wrought plate in order to ascertain the standard thereof for the good and safety of the public." (1) The parcel contained, amongst other things, the following articles :— Nineteen match-boxes enamelled on silver foundations, seven cigarette cases enamelled on silver foundations, one cigarette case enamelled on gold, three gold or silver letter clips with parts ornamented with enamel work, and two watch-bracelets, each consisting of a gold chain containing a watch in a gold case, which was ornamented with jewels but not enamelled. The Goldsmiths' Company claimed that all the articles were wares of gold and silver and gold and silver plate within the meaning of and were subject to the provisions of the Customs Act, 1842 (5 & 6 Vict. c. 47), and other statutory provisions relating to or governing the assaying, stamping, and marking of gold and silver plate imported into the United Kingdom from foreign parts, and that the articles were liable to be hall-marked before they could legally be sold in the United Kingdom.

The plaintiff by his pleadings contended that the gold or silver in each article constituted a small part thereof, either in bulk or value ; that the main ingredient therein was the enamel or precious stones, or both, the gold or silver being merely used as a foundation or setting; that the design and workmanship of the enamel and the precious stones and the setting thereof gave each article its distinctive character and value ; and that none of the articles were gold or silver plate.

Alternatively, the plaintiff, by his pleading, said that, if the articles or any of them were gold or silver plate within the meaning of the statutory provisions aforesaid,

(*a*) The enamel used in the enamelled articles was within the meaning of the expression "jewels or other stones" used in ss. 2 and 6 of the Plate (Offences) Act, 1738 (12 Geo. 2, c. 26) ;

(*b*) All the articles were "jewellers' works" within the meaning of s. 2 of the same Act, and accordingly exempt from the statutory requirements as to assaying, stamping, and marking ;

(*c*) The watch-bracelets and the enamelled gold cigarette case

(1) See *Goldsmiths' Company* v. *Wyatt*, [1907] 1 K. B. 95.

PARKER J. 1910 FABERGÉ v. GOLDSMITHS' COMPANY.

were exempt from the statutory requirements by virtue of s. 6 of the Act of 1738 as being either gold chains or manufactures of gold "so richly engraved, carved, or chased, or set with jewels or other stones, as not to admit of an assay to be taken of, or a mark to be struck thereon, without damaging, prejudicing, or defacing the same."

The plaintiff brought the present action against the company, sued as "The Wardens and Commonalty of the Mystery of Goldsmiths of the City of London" (1), claiming a declaration that none of the articles were gold or silver plate within the meaning of, or were subject to the provisions of, the Customs Act, 1842, or any other statutory provision relating to the assaying, stamping, or marking of gold and silver plate imported into the United Kingdom from foreign parts, and delivery up of the packet and the articles contained therein.

The action was tried, with witnesses, on November 7, 8, and 9, 1910. (2)

Sir C. A. Cripps, K.C., *Romer, K.C.*, and *Dighton Pollock*, for the plaintiff. The main question is whether enamels and enamel work are within the statutory provisions for hall-marking, by the Goldsmiths' Company, of gold or silver plate, or gold or silver ware, or gold or silver manufacture. Modern enamel work is mostly done upon a metal base, which is generally either gold or silver. Gold is not used in preference to silver to add to the intrinsic value of the article, but because it is more suitable for enamels of certain colours, whereas silver is a better groundwork where enamels of other colours are to be laid on. The enamel work is artistic work, which is relatively of much greater value than the metallic base, especially where that base is silver. Enamels are not within the purview of the statutes under which the Goldsmiths' Company is entitled to assay or mark gold and silver ware and plate.

The Plate (Offences) Act, 1738 (12 Geo. 2, c. 26), contains many material provisions. It is intituled "An Act for the better preventing Frauds and Abuses in Gold and Silver Wares." The preamble recites various earlier statutes relating to "any vessel,

(1) See 12 Geo. 2, c. 26, preamble. (2) See note on p. 298, post.

jewel, or other thing of gold or silver," any "workmanship of silver," "plate or goldsmiths' ware of gold," and "plate or goldsmiths' wares of silver." The preamble to the Act of 1738 also recites that "the Wardens and Commonalty of the Mystery of Goldsmiths of the City of London are, and have been a guild or corporation time out of mind, with divers privileges, confirmed and enlarged from time to time by several charters from His Majesty's Royal Predecessors, Kings and Queens of this Realm (amongst other things) for the searching, assaying, supervising, marking and regulating wrought plate, in order to ascertain the standard thereof, for the good and safety of the publick," and refers to certain letters patent of Charles II., empowering the company, amongst other things, "to seize and break deceitful wares." Then there is a recital as to "the standards of the plate of this kingdom" and as to frauds committed "in the manufacturing of gold and silver wares." Sect. 1 of the Act of 1738 enacts that after May 28, 1739, there shall be certain standards in the manufacture in England of every "gold vessel, plate, or manufacture of gold," and every "silver vessel, plate, or manufacture of silver." Sect. 2 of the Act of 1738 exempts "jewellers' works" as therein described. Enamel work, not being gold or silver, needed no special words of exemption from the operation of s. 1. Then s. 3 relates only to "gold or silver wares." Sect. 5 relates to selling or exporting unmarked "any gold or silver vessel, plate or manufacture of gold or silver," and s. 6 exempts from the operation of the Act a number of named articles introduced as "the following wares of gold or silver." That section only contains an exception from the marking of gold and silver wares. The enamelled things in the present case are not "gold or silver wares" or "gold and silver plate," or "gold and silver manufacture," but if they were they would be exempted by s. 6 of the Act from hall-marking as coming within the words "manufacture of gold or silver so richly engraved, carved, or chased, or set with jewels or other stones, as not to admit of an assay to be taken." Sect. 8 relates to "any wrought plate of gold or silver whatsoever" and "any manufacture of gold or silver." Sect. 13, according to the side-note, refers to "prices for the assaying wrought plate."

PARKER J. 1910 FABERGÉ v. GOLDSMITHS' COMPANY.

[PARKER J. It looks as if "wrought plate" included all gold and silver ware.]

We are not concerned to state that plate should have any narrow signification. But an enamel is not either wrought plate, or a manufacture of gold or silver, or gold or silver ware. Sect. 13 authorizes certain charges on wrought plate of gold or silver, not exceeding "for assaying, trying, and marking gold watch-cases or gold watch-boxes" 10*d*. apiece.

The term "plate" in the Act of 1738, when used by itself, has been held to include articles so far removed from any ordinary meaning of "plate" as gold and silver watch-cases: *Goldsmiths' Company* v. *Wyatt*. (1) Then s. 20 enables the company's officers, where the plate is not up to standard, to "cut, break, and deface" the same.

[*Buckmaster, K.C.* A subsequent Act provides that the articles are to be sent back if they have been imported.

PARKER J. I presume there are enamels made in England.]

Yes, but they are hall-marked before the enamel is put on. The gold or silver is only used as a base for the enamel, which is the substance of the article. Gold of standard quality might not give the required colour.

The Act 30 Geo. 3, c. 31, s. 3, exempts from the obligation as to stamping or marking silver wares consisting of "chains, necklace beads, lockets, any phillagree work, shirt buckles or broaches, stamped medals, or spouts to china, stone, or earthenware teapots." This exemption replaced the previous exemption of certain silver articles. Further exemptions are given by ss. 4 and 5 of 30 Geo. 3, c. 31.

The Customs Act, 1842 (5 & 6 Vict. c. 47), s. 59, placed on the same footing as plate made in this country plate imported from abroad which, if not imported, would have come within the statutory provisions as to marking. By s. 60 of the same Act provision is made for imported gold and silver plate being assayed, stamped, and marked. The Act 7 & 8 Vict. c. 22, s. 5, provides for the re-assaying and re-marking of gold and silver wares to which additions have been made after they have been assayed and marked. The defendants will suggest that when

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we are using gold or silver as a base for enamel work we should send the metal base to be hall-marked before the enamel is put on, and then send the base back to Russia to be enamelled, and re-import the altered article. But s. 5 of the Act of 1844 seems to require, in such a case, a re-assaying and re-marking.

[PARKER J. Sect. 5 seems to contemplate an addition of metal which may or may not be metal up to the assay.]

If the enamel is an addition it requires hall-marking; if it is not within the section, it is because it is not gold or silver ware at all. Sect. 14 of the same Act defines "base metal" as being "any metal whatsoever other than gold or silver of the respective standards required by law." If our silver is not up to standard we may call our article a base metal covered with enamel and import it without having it assayed or marked.

Further provision as to assaying and stamping gold or silver plate imported from abroad is made by s. 10 of the Revenue Act, 1883, under which, if the articles assayed are not up to standard, they are not to be broken up, but are to be returned to the warehouse and sent back abroad. But if the article was up to standard and was sent back to Russia, and there enamelled, it would have to be assayed and stamped over again if it was re-imported into this country although it already bore a mark. It is said that, if you have an article of silver embossed with gold, you must take the gold and the silver separately to be hall-marked. By s. 4 of the Revenue Act, 1884 (47 & 48 Vict. c. 62), there is an exemption of certain oriental plate. By s. 10 of the Customs Act, 1890, the duties on imported plate are repealed, and by s. 1 of the Hall-marking of Foreign Plate Act, 1904 (4 Edw. 7, c. 6), an alteration is made as to marking, but it is the plate or article which is to be marked so as to shew whether it was made in this country or abroad, not something that is going to be used in the manufacture of a plate or article. Then the Assay of Imported Watch-Cases (Existing Stocks Exemption) Act, 1907, was passed to meet the decision in *Goldsmiths' Company* v. *Wyatt* (1) to this extent, that watch-cases already in this country before that decision were exempted from stamping.

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The watch-bracelets would be either jewellers' work or exempted as chains; they are not enamelled at all. The enamelled works are either not within the purview or mischief of the Acts at all, or come within the exemptions. One of the exemptions is in favour of articles which cannot be stamped without injury or destruction, which would be sure to happen in the case of enamels.

Buckmaster, K.C., John Henderson, and *Graham-Campbell,* for the defendants. The fact that it may be inconvenient for a foreign manufacturer of enamels to send over his gold or silver base in the rough to be stamped before it is enamelled has nothing to do with the question whether the Acts have been complied with. If the article has once been marked, the obligation to re-mark does not arise when jewels or enamels have been put on. If another structure of metal were added, that would be a different matter. These articles are things which, apart from their decoration, fall within the description of gold and silver wares or gold and silver plate, and they must not only be marked, but be up to standard. The enamel put on a gold or silver cigarette case does not make that article less a gold or silver cigarette case. A line cannot be drawn between enamels of superior and enamels of inferior quality of manufacture. The argument as to the relative values of the gold or silver base and the artistic enamelling work put on it cannot be entertained. In this country purchasers have nothing but the Russian mark, of which they know nothing, to guide them as to what the metal used is, or whether it is up to any standard, and that is the very mischief which the Acts were designed to stop, by requiring the hall-mark to be placed on the articles. The fact that the enamelling is more or less relatively valuable is immaterial. There is no difficulty in having the gold or silver base stamped before the enamel is put on; English makers do this, and foreign makers have no right to be in a better position. How is the company's officer to judge whether the artistic production is more valuable than the metal base, so as to say that the thing is an enamel and not a piece of gold or silver ware? The name of the article does not affect its character, and by calling a cigarette case an enamel you do not get rid of the fact that it is made of

gold or silver. The effect of s. 59, as construed in *Goldsmiths' Company* v. *Wyatt* (1), is that the gold and silver plate which when imported from abroad require stamping are the gold and silver which require stamping under the Act of 1738. And the gold and silver plate, or wares, or manufactures, which are required to be marked by the Act of 1738 are clearly stated. If articles are not exempted they must be marked. These things are not "jewellers' work," for even if they were jewels, the jewels are not set in the gold or silver. A setting is the extremely fine rim or wire of metal by which the jewel is secured, and which is expressly exempted. A massive ring with one large stone stuck into it is not the setting of the stone, and it would have to be marked. Jointed night ear-rings, used to keep open the aperture in the ear, are exempted as small things which can scarcely be marked. As to gold springs of lockets, the reason for the exemption is plain. Gold is malleable and not elastic, and unless it is heavily alloyed it has not the resilience required of a spring.

Sect. 6 of the Act of 1738 shews what "wares of gold and silver" are, and the number of small things exempted are nevertheless gold or silver ware, and but for the exemption would have had to be marked. No one at the time would have suggested that the articles in this case were enamels, and they are certainly not any of the articles exempted. Sect. 7 of 24 Geo. 3, c. 53, shews that it is not necessary to bring articles to be marked only when they are in a finished state. Under 30 Geo. 3, c. 31, certain alterations were made as to the articles which had to be stamped. The Legislature has not concerned itself with the way in which precious metals are associated with skilled work. The Legislature never meant to throw on the officers of the company the duty of deciding as to the relative values of the metal and the artistic work upon it. The plaintiff's contention that the intrinsic value of the metal used is relatively small is not supported by the evidence.

The gold and silver articles are not so richly engraved or bejewelled that they cannot be marked without being damaged. If the plaintiff is right, the British public can only rely on the Russian marks, and that is what the Acts are aimed at. The

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gold watch-cases are not jewellers' work and are within no exemption from assaying.

Sir C. A. Cripps, K.C., in reply.

Cur. adv. vult.

Nov. 21. PARKER J. The existing statutory provisions as to assaying and marking gold or silver plate imported from abroad are contained in s. 59 of the Customs Act, 1842, s. 10 of the Revenue Act, 1883, and the Hall-marking of Foreign Plate Act, 1904. It was in effect decided in *Goldsmiths' Company* v. *Wyatt* (1) that the word "plate," as used in those provisions, included every article of gold or silver imported from abroad which, had it been made in the United Kingdom, would have been subject to the provisions as to assaying and marking contained in the statute 12 Geo. 2, c. 26. Whether, therefore, any particular article of gold or silver imported from abroad ought to be assayed or marked depends upon the true construction of the statute 12 Geo. 2, c. 26.

The articles as to which the present dispute arises include nineteen enamelled silver match-boxes, seven enamelled silver cigarette cases, one enamelled gold cigarette case, and three gold or silver letter clips, with parts ornamented in enamel work.

It is admitted, and in my opinion could not well be disputed, that all these articles, if made in the United Kingdom, would, but for the fact that they are enamelled, be within the provisions as to assaying and marking contained in 12 Geo. 2, c. 26. But it is argued that the fact that the articles in question are enamelled either takes them altogether out of the purview of the statute or brings them within one or other of the exceptions contained therein.

The argument that the articles in question are not within the purview of the statute at all depends on the following considerations. Enamel work requires a metal base or foundation, and the selection of the particular metal to be used depends on the colour or artistic effect which it is desired to produce. Gold is suitable for some colours or effects, silver for others; but, whatever metal is used, the product is simply an enamel, the value of

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which as a work of art is or may be out of all proportion to the value of the metal in the base or foundation. Such an artistic production cannot, it is said, be a manufacture of gold or silver within the meaning of the statute; it is an enamel and nothing more. I think it possible that these considerations may, in certain cases, justify the argument put forward. The base or foundation of silver or gold on which the artist commences to enamel a picture or design may not be, in any true sense of the word, a manufacture of gold or silver, and, if this be so, it could not very well become a manufacture of gold or silver merely because it was used as the base or foundation of artistic work in enamel. But it seems to me a fallacy to argue from this that an undoubted manufacture of gold or silver, such as a match-box, cigarette case, or letter clip, ceases to be such because it is used as the base or foundation of enamel work. Whether the value of the metal contained in the article is or is not a small or large proportion of the value of the completed article depends, of course, to a great extent on the artistic merit of the enamel work. If the enamel work has little or no artistic merit, the value of the metal employed will be the chief item in the value of the completed article. If the artistic merit of the enamel work is very great, the value of the completed article may depend almost entirely on such artistic merit. Even in the case of the articles in question, which have very considerable artistic merit, I am satisfied that the value of the metal is a material item both in the cost price and the selling price.

Further, if the artistic merit of the enamel work had to be considered before it could be determined whether an article which, without the enamel work, would have been clearly a manufacture of gold or silver, had in fact ceased to be such, the officials of the Custom House or the Goldsmiths' Company would hardly be qualified to fulfil their duties unless they were skilled in judging the artistic merit of enamels; and this would be a somewhat quaint conclusion. In my opinion, therefore, no article which is once a manufacture of gold or silver within the statute, can cease to be such because it is used as the base or foundation of enamel work, however great may be the artistic merit of such enamel work compared with the value of the metal employed.

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It remains to be considered whether the articles in question are within any of the exceptions contained in the statute. The first exception is contained in s. 2 of the statute, which excepts "jewellers' works," namely, "gold or silver wherein any jewels or other stones are . . . set, . . . jointed night ear-rings of gold," and "gold springs of lockets." It is suggested that enamels are jewels, but, even assuming this, it is, in my opinion, impossible to hold that the gold or silver foundation on which enamels are worked is gold or silver in which they are "set" within the meaning of the statute. If an enamel is a jewel, I think it might be set in gold or silver for the purpose of wearing as an article of personal adornment, and in that case the gold or silver setting might be within the exception; but when a gold or silver article is used as the foundation for the enamel work only, I do not think that the enamel can properly be said to be set in gold or silver at all.

Again, s. 6 of the statute (which is now in force as to gold only) excepts a number of small articles, and also any gold or silver vessel, plate, or manufacture of gold or silver, so richly engraved, carved, or chased, or set with jewels or other stones as not to admit of an assay being taken of or a mark to be struck thereon without damaging, prejudicing, or defacing the same. I do not think the enamelled gold cigarette case in question can be properly described as engraved, carved, or chased at all; nor (if an enamel can be called a jewel) can it be properly described as a gold cigarette case richly set with jewels. The enamel work is not set in gold in any proper sense of the words. It is worked on the gold as the metal foundation or base.

It is said, and said truly, that none of the articles in question can now be assayed or marked without risk of damaging the enamel. I gather that all or most completed articles sent to the Goldsmiths' Company to be assayed or marked have to go back to the manufacturers to be touched up and polished after the process, and that it has, therefore, been the practice of the company, for over 150 years at least, to assay and mark articles in the rough, so that no further marking is required after they have passed through the hands of the craftsmen responsible for any artistic work thereon. This practice is

recognized by the Act of 24 Geo. 3, c. 53, s. 7, and enamellers in the United Kingdom are accordingly in the habit of procuring cigarette cases and other articles which they propose to enamel to be assayed and marked before the work of enamelling is commenced, and of thus avoiding any risk attendant on assaying or marking after the enamel work has been completed. There seems no reason why importers of enamelled gold or silver articles should not proceed in the same way. They are in this respect in no worse position than the manufacturers in the United Kingdom, except, possibly, that the cost of sending their articles in the rough to the Goldsmiths' Company may be slightly greater.

I have come to the conclusion, therefore, that all the enamelled articles in question are within the provisions of the Customs Act, 1842, s. 10 of the Revenue Act, 1883, and the Hall-marking of Foreign Plate Act, 1904, and ought to be assayed and, if up to standard, marked by the Goldsmiths' Company before they are admitted into this country.

There are two articles I have not yet mentioned, namely, two bracelets of gold chainwork in each of which is a gold watch. That gold watch-cases forming part of finished watches imported from abroad require to be assayed and marked cannot be disputed after the decision of *Goldsmiths' Company* v. *Wyatt*. (1) On the other hand, gold chain bracelets are within the exception contained in s. 6 of 12 Geo. 2, c. 26. I do not, however, think that a watch-case comes within the exception merely because it is incorporated in a gold chain. It might come within this exception if it were so richly engraved, carved or chased, or set with jewels or other stones as not to admit of an assay to be taken of or a mark to be struck thereon without damaging, prejudicing, or defacing the same. Each of the watches in question has stones set thereon, but there is no evidence at all that either of them cannot be assayed or marked in the usual way. Indeed this contention, though raised in the statement of claim, was not pressed, it being argued merely that they fell within the provisions of s. 2 as jewellers' work, an argument which in my opinion cannot be maintained.

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In my opinion the whole action fails and must be dismissed with costs.

Solicitors for plaintiff: *Rawle, Johnstone & Co., for F. A. Woodcock, Manchester.*

Solicitors for defendants: *Prideaux & Sons.*

NOTE.—The enactments referred to in his Lordship's judgment are as follows:—

12 Geo 2, c. 26, s. 2: "Provided always, and it is hereby declared that nothing in this Act shall extend to any jewellers' works, that is to say, any gold or silver wherein any jewels or other stones are or shall be set (other than mourning rings) nor to any jointed night ear-rings of gold, or gold springs of lockets."

Ibid., s. 6: "Provided also, and it is hereby declared, that nothing in this Act contained shall extend to oblige any of the following wares of gold or silver to be stamped or marked by the said respective Companies of Goldsmiths, or any of them; that is to say, rings, collets for rings or other jewels, chains, necklace beads, lockets, hollow or raised buttons, sleeve buttons, thimbles, coral sockets and bells, ferrils, pipe lighters, cranes for bottles, very small book clasps, any stock or garter clasps jointed, very small nutmeg graters, rims of snuff boxes, whereof tops or bottoms are made of shell or stone, sliding pencils, toothpick cases, tweezer cases, pencil cases, needle cases, any philligree work, any sorts of tippings or swages on stone or ivory cases, any mounts, screws, or stoppers to stone or glass bottles, or phials, any small or slight ornaments put to amber or other eggs or urns, any wrought seal or seals with cornelian or other stones set therein, or any gold or silver vessel, plate, or manufacture of gold or silver so richly engraved, carved, or chased, or set with jewels or other stones, as not to admit of an assay to be taken of, or a mark to be struck thereon, without damaging, prejudicing or defacing the same, or such other things as by reason of the smallness or thinness thereof are not capable of receiving the marks herein before-mentioned, or any of them, and not weighing ten penny weight of gold or silver each."

The Customs Act, 1842 (5 & 6 Vict. c. 47), s. 59: "And be it enacted, that all gold and silver plate, not being battered, which shall be imported from foreign parts after the commencement of this Act, and sold, exchanged, or exposed to sale within the United Kingdom of Great Britain and Ireland, shall be of the respective standards now required for any ware, vessel, plate, or manufacture of gold or silver wrought or made in England; and that no gold or silver plate so to be imported as aforesaid, not being battered, shall be sold, exchanged, or exposed to sale within the said United Kingdom until the same shall have been assayed, stamped, and marked, either in England, Scotland, or Ireland, in the same manner as any ware, vessel, plate, or manufacture of gold or silver wrought or made in England, Scotland, or Ireland respectively is or are now by law required to be assayed,

stamped, and marked . . . . Provided always, that no article or ware of gold or silver so to be imported as aforesaid shall be liable to be assayed, stamped, or marked as aforesaid which would not be liable to be assayed, stamped, or marked if it had been wrought or made in England."

Revenue Act, 1883 (46 & 47 Vict. c. 55), s. 10. " . . . Be it enacted,—

" 1. That all gold and silver plate imported into Great Britain or Ireland, shall . . be deposited in a bonded warehouse, and no such plate shall be delivered for whom use until assayed, stamped, and marked according to law.

" 2. That for the purpose of assay, such plate may upon . . notice, . . security, . . and subject to . . regulations . . be removed from the warehouse . . and be delivered into the hands of the officers of the assay office nearest to the port of importation.

" 3. That upon . . payment . . of the expense of assay, the officer of the assay office shall assay the plate and shall give notice of the result . . to the proper officer of customs, and to the importer.

" 4. If such plate shall be found upon assay to be of standard quality, it may . . be cleared for home use, and the officer of the assay office upon production of a certificate . . that the duty and all proper charges have been paid, shall stamp, mark, and deliver the plate to the importer.

" 5. If such plate shall be found upon assay not to be of standard quality, it shall not be cut, broken or defaced at the assay office, but shall upon notice and under . . regulations . . be removed from the assay office . . . and be returned to the warehouse.

" 6. All plate returned to the warehouse after assay may within one month from such return be exported by the importer under such conditions and upon such security as are prescribed by the customs laws in relation to the exportation of warehoused goods.

" 7. After the expiration of one month from the return of any plate to the warehouse, or sooner if the importer shall desire it, any part thereof not exported shall be cut, broken, and defaced by the proper officer of customs, and shall be delivered free of duty upon payment of all proper charges.

" 8. Actual deposit of plate in a warehouse under this section may, with the approval of the Commissioners of Customs, be dispensed with in cases in which the plate can be and is removed direct from the place of examination to the assay office, but plate so removed direct shall, nevertheless, for the purposes of this section be deemed to have been actually deposited.

. . . . .

" 11. Articles of plate exempted from assay in the United Kingdom are not subject to the provisions of this section."

. . . . .

The Hall-marking of Foreign Plate Act, 1904 (4 Edw. 7, c. 6), s. 1:

" (1.) Where, for the purpose of complying with sections 59 and 60 of the Customs Act, 1842, or section 10 of the Revenue Act, 1883, any plate has to be assayed, stamped, and marked, or where, for any other purpose, any plate or article imported from a foreign part is brought to an assay office in the United Kingdom to be assayed, stamped or marked, the plate or article shall be marked, in such manner as His Majesty may determine by Order in

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Council, so as readily to distinguish whether the plate or other article was wrought or made in England, Scotland, or Ireland, or was imported from foreign parts, and such mark or marks shall be deemed to be a compliance with the said Acts.

"(2.) Any person, who, after a date fixed by His Majesty by Order in Council, brings or causes to be brought any plate or other article to be assayed, stamped and marked at an assay office, shall state in writing, in manner provided by His Majesty by Order in Council, whether the plate or article was wrought or made in England, Scotland, or Ireland, or was imported from foreign parts, but it shall not be necessary to make such statement in writing where any plate or other article is brought to an assay office in charge of an officer of customs, under the provisions of the Revenue Act, 1883, for the purpose of being assayed, stamped or marked as having been imported from foreign parts.

. . . . .

"(5.) The Customs Act, 1842, shall apply as if a reference to the mode of marking required under this Act were substituted for a reference to the mode of marking under that Act."

. . . . .

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In re MACKAY.
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[1910 M. 885.]

Trustee—Breach of Trust—Will—Power to employ Agents—Payment of Duty — Cheque payable to Solicitor — Misappropriation — Liability— "Honestly and reasonably"—Judicial Trustees Act, 1896 (59 & 60 *Vict. c.* 35), *s.* 3.

The testator gave his property to the defendant and another as executors and trustees and declared that they might employ agents to act for them under his will and that each of them should be indemnified out of the trust estate against the acts and omissions of such agents. The second trustee was a solicitor and managed the estate whilst the defendant looked after the testator's business. The solicitor trustee died, and the defendant instructed another firm of solicitors to act for the estate. The defendant kept the trustees' cheque-book, and at the new solicitor's request he signed cheques payable to him for considerable sums which were said to be wanted for payment of death duties. The solicitor misappropriated the proceeds of these cheques, and the beneficiaries took proceedings to make the defendant liable for the amount thus lost to the estate:—

Held, that the defendant was justified in believing that, having

regard to the terms of the will, he might safely pay the money to the solicitor; that he had acted honestly and reasonably, and ought to be excused under s. 3 of the Judicial Trustees Act, 1896.

THE following statement of facts is taken from the judgment of Parker J.:—

By his will, dated June 13, 1900, James Matheson Mackay appointed the defendant, whom he describes as an accountant, and George James Wilson, a solicitor, to be his executors and trustees, and thereby devised and bequeathed to them all his real and personal estate in trust for sale and out of the proceeds to pay his funeral and testamentary expenses and debts and certain legacies, and to pay the residue to the plaintiffs in equal shares, and he gave his trustees wide powers of management over his estate and affairs, including a power to carry on his business of a hotel proprietor, and he directed that his "trustees and executors may employ agents to act for them under this will and each of them shall be indemnified out of the trust estate against the acts and omissions of such agents or any co-executor or co-trustee to whom he may delegate any of the trust duties." The testator died on February 9, 1901. He had accumulated a considerable fortune in his business. The defendant, whom he describes as an accountant, was, in reality, merely his bookkeeper, having served him in that capacity for twenty years at 20*s.* a week, and is not a man of much education or experience in business matters. The testator's will was proved by both executors on July 23, 1901. The defendant left the general management of the estate in the hands of his co-executor, George James Wilson, devoting his own time to matters in connection with the carrying on and winding up of the testator's business. He, however, kept the executors' cheque-book in his own possession, and used to draw, sign, and hand to Wilson cheques for such amounts and in favour of such persons as the latter might direct. Among cheques which he so signed were certain cheques in favour of the Commissioners of Inland Revenue for duties payable in respect of the estate. Wilson died on January 6, 1903, and after his death the defendant instructed the firm of Messrs. Gee & Dunn to act as his solicitors, and Mr. Dunn of that firm appears to have thenceforward taken much the same part in the

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management of the estate as had theretofore been taken by Wilson, the defendant still retaining the cheque-book and drawing and signing cheques as and when Mr. Dunn required them. At Mr. Dunn's request the defendant drew and signed certain cheques for further duties, making them payable to Messrs. Gee & Dunn. The firm of Messrs. Gee & Dunn was dissolved in October, 1905, but Mr. Dunn continued to be employed by and act for the defendant in the same manner as before the dissolution. On July 8, 1908, and February 16, 1909, and December 18, 1909, Mr. Dunn obtained from the defendant cheques for 326*l.*, 246*l.*, and 81*l.* 15*s.* 2*d.* respectively, payable to himself for the purpose, as he stated, of enabling him to pay yet further duties. In the case of the first two cheques the amounts for which the cheques were drawn were not required for the purpose stated, and these amounts were misappropriated by Mr. Dunn. In the case of the third cheque the amount for which it was drawn was in fact required for the purpose stated, but it was not applied for that purpose, being also misappropriated by Mr. Dunn. The moneys so appropriated cannot in all probability be now recovered.

A. Grant, K.C., and *P. M. Walters*, for the plaintiffs. By paying money into the hands of his solicitor unnecessarily the defendant has committed a breach of trust: *Speight* v. *Gaunt.* (1) He ought to have drawn the cheques in favour of the Commissioners of Inland Revenue, who, before this date, had begun the practice of accepting cheques in payment of duties. Decisions on this question which refer to a period when they would not take cheques do not apply to this case. The rule is not altered by the clause in the will which enables the defendant to employ agents; unnecessary employment is not authorized. The clause is not in the common form set out in Key and Elphinstone's Precedents in Conveyancing, 9th ed. vol. ii. p. 595, and Wolstenholme's Forms and Precedents, 5th ed. p. 94, for it omits the words "including the receipt and payment of money." The insertion of those words shews that if the testator desires that his executors should be authorized

(1) (1883) 9 App. Cas. 1.

to employ agents for payment of money he must expressly mention it.

Romer, K.C., and *R. Nevill*, for the defendant. The defendant has not committed any breach of trust; and, if he has, the Court will excuse him under s. 3 of the Judicial Trustees Act, 1896. He was justified in signing cheques drawn in favour of his solicitor. Any prudent man of business would do the same in his own affairs, and no one could be expected to know that the Commissioners would accept cheques. Even apart from the power given by the will to employ agents there has been no breach of trust. The defendant would have been justified in giving money to his solicitor for payment of debts: *Bacon* v. *Bacon* (1); *In re Smith* (2); *In re Lord De Clifford's Estate.* (3) It cannot make any difference that this money was provided for the purpose of paying duties instead of debts.

In this case the defendant was expressly authorized to employ agents, and these clauses are inserted in wills with the object of improving the position of trustees.

[PARKER J. Must not such a clause be construed to give power to employ an agent where a prudent man would do so in his own affairs?]

Any act in the administration of the estate may be done by the trustee through an agent. There is no reason why a clause which was inserted for the protection of the trustees should be cut down. It does contemplate delegation of duties; though, no doubt, the trustee must exercise a discretion in the administration of the trust and the selection of the agent. Here the testator himself selected a solicitor as one of his executors. Therefore there has been no breach of trust. But if the defendant is technically wrong he has acted honestly and reasonably and ought to be excused under s. 3 of the Judicial Trustees Act, 1896. The only question is whether he has acted reasonably; not whether some other course would have been more reasonable. We do not say that in every case in which duties are payable by a trustee he is justified in handing the money to a solicitor.

(1) (1800) 5 Ves. 331.
(2) (1902) 71 L. J. (Ch.) 411.
(3) [1900] 2 Ch. 707.

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[PARKER J. Are there two standards of reasonableness in Courts of Equity, one with respect to breaches of trust and another with respect to the Act of 1896?]

The standard of reasonableness under the Act is not so high as in questions of breach of trust. This clause was not intended to be useless. If it was not sufficient actually to authorize what the defendant did, it was sufficient ground for his thinking that he was so authorized; and that would make his conduct "reasonable" within the Act.

[PARKER J. Can the Court take into consideration the fact that a man is not intellectually up to the normal standard and therefore could reasonably trust a solicitor? If the standard is to vary with the individual all sorts of difficulties will be introduced. The standard of honesty must, of course, be always the same.]

It may be reasonable for one man to do a thing, but not for another. If a trustee is an expert on the point in question it would not be reasonable for him to ask advice, although another trustee ought to do so. Under this Act a man's character must be taken into consideration: *Perrins* v. *Bellamy*. (1) Sect. 3 was put into the Act for the benefit of trustees who had committed breaches of trust: *In re Grindey*. (2)

[PARKER J. The question is what a normal man would reasonably have done, not what the particular man did.]

Any normal man would have thought he was protected by the clause of the will which authorizes the employment of agents, and it is very doubtful whether he would not be protected.

[PARKER J. referred to *In re Bird*. (3)]

That is very like the present case. No one can be expected to know to whom cheques should be made payable for such complicated matters as estate duty. A decision in the defendant's favour would be no authority for saying that a man would be always justified in paying money through his solicitor.

A. Grant, K.C., in reply. If a man thinks he has power to do a thing, when he has not, the Court may excuse him: *Castle* v. *Warland* (4), which was decided before cheques were

(1) [1898] 2 Ch. 521; [1899] 1 Ch. 797.
(2) [1898] 2 Ch. 593, 598.
(3) (1873) L. R. 16 Eq. 203.
(4) (1863) 32 Beav. 660.

accepted by the Inland Revenue; but if he exercises the supposed power negligently he will not be excused: *Shaw* v. *Cates.* (1) The defendant was negligent in paying a non-existing duty through a solicitor, and in doing so by a cheque drawn in favour of the solicitor: *In re Remnant.* (2) This was not a payment which ought to be made through a solicitor. There was a clear breach of trust by the defendant and he ought not to be excused. The Act was intended to apply to questions like the retaining of investments and mistakes of construction, not to running unnecessary risks: *Perrins* v. *Bellamy* (3); *Williams* v. *Byron.* (4)

[PARKER J. The real advantage of the Act is that it prevents people from bringing so many actions.]

To be reasonable under the Act a trustee must still act as an ordinary prudent man of business would do in his own affairs: *Speight* v. *Gaunt.* (5) The Act has never been applied where the trustee has been negligent. A trustee does not entitle himself to relief by proving that he has acted honestly and reasonably; he must shew that under all the circumstances he ought fairly to be excused for his breach of trust: *National Trustees Company of Australasia* v. *General Finance Company of Australasia.* (6)

Cur. adv. vult.

Dec. 19. PARKER J. stated the facts as above, and proceeded: Under these circumstances, various questions of considerable difficulty arise. In the first place, is it a breach of trust for an executor, who is clearly entitled to employ a solicitor to ascertain the duties payable, to entrust such solicitor with money for the payment of these duties? Next, assuming it to be a breach of trust, does the clause in the will empowering the executors to employ agents and exempting them from liability for loss occasioned by the acts or omissions of such agents make any difference? In the third place, if the defendant has been, notwithstanding the power of delegation contained in the will,

(1) [1909] 1 Ch. 389.
(2) (1849) 11 Beav. 603, 612.
(3) [1899] 1 Ch. 797, 800.
(4) (1901) 18 Times L. R. 172.
(5) 9 App. Cas. 1.
(6) [1905] A. C. 373.

PARKER J. 1910 MACKAY, *In re.* GRIESSE MANN *v.* CARR.

guilty of a breach of trust, is it a case in which the Court can give relief under s. 3 of the Judicial Trustees Act, 1896?

It is to be observed that in order to give relief under the Judicial Trustees Act, 1896, it is not necessary for the Court to decide that the trustee is under any personal liability. It is enough that in the opinion of the Court he may be under some personal liability. It will be convenient, therefore, to deal first with the question whether the Act applies to the present case. One thing at all events is clear, namely, that as a condition precedent to granting relief under s. 3 the Court must be satisfied that the trustee who asks to be relieved has acted both honestly and reasonably. There can in this case be no possible doubt that the defendant has throughout acted honestly. The difficulty arises in considering the question whether he has acted reasonably. In the case of *In re Turner* (1), Byrne J. appears to have been of opinion that acting reasonably means acting with such a degree of prudence as a person of ordinary intelligence and diligence may be expected to act with in the conduct of his own affairs. If this be so, it would seem to follow that the Act can have no application to any case in which the question of whether there has or has not been a breach of trust depends upon whether the trustee has so acted. For example, it is clear from the case of *Speight* v. *Gaunt* (2) that trustees ought not to allow trust money to pass through the hands of agents unless a person acting with reasonable care and prudence on his own account would under the like circumstances employ such agents and allow his own money to pass through their hands. A person of ordinary prudence will not, it is assumed, incur any unnecessary risk, that is, any risk for which there is no "moral necessity from the usage of mankind." In the case of purchase transactions on the Stock Exchange there is this moral necessity, but in the case of purchases outside the Stock Exchange there is not. A trustee, therefore, who in such a case entrusts the purchase-money to an agent to be transmitted to the vendor does not act up to the standard of reasonableness which a Court of Equity requires in a trustee and is therefore liable if the money is lost. Of course trustees not infrequently,

(1) [1897] 1 Ch. 536.

(2) 9 App. Cas. 1.

either by nature or lack of education, fall short of the standard of reasonableness attributed by Courts of Equity to persons of ordinary intelligence and diligence. It is their misfortune and not their fault, but so far as I know no trustee has ever been held not liable for a breach of trust by reason of his natural deficiencies or his lack of educational advantages. He may have acted perfectly honestly and to the best of his ability, but if he has not come up to the Court's standard of prudence he is still held liable. Can a trustee in such a case claim the benefit of the Judicial Trustees Act, 1896 ? According to Byrne J.'s opinion the answer must be in the negative, and Chitty L.J. in *In re Grindey* (1) points out the dangers of construing the Act so as to introduce these personal considerations.

It appears, however, from the last-mentioned case that in considering whether a trustee has acted reasonably within the meaning of the 3rd section the terms of the instrument creating the trust ought to be taken into consideration. If an ordinary business man might reasonably entertain a particular view of the construction of the instrument, and the action of the trustee would have been justified if that view had been the true one, that trustee cannot be said to have acted unreasonably merely because this view of the construction of the instrument is wrong. Even where a trustee has distributed an estate on an erroneous construction of a will he has been relieved under the Act. If the will in question be considered it will be found to contain a clause the object of which is evidently to relax in favour of the trustees the severity of the rule precluding a trustee from employing agents except in cases in which there is a "moral necessity arising from the usage of mankind." It exempts the trustees from liabilities which might be imposed upon them according to the strict doctrines of Courts of Equity in administering trusts. A trustee acting within the limits of this power would not be committing a breach of trust merely because if there were no such power he would not be acting up to the standard required by the Court in ordinary cases. The difficulty is to ascertain with any precision what the limits of such a power are. On the one hand it might be going too far to hold that

(1) [1898] 2 Ch. 593, 601.

PARKER J. 1910 MACKAY, *In re.* GRIESSE-MANN *v.* CARR.

whenever the trustee had a payment to make out of the testator's estate the clause would justify his entrusting an agent with the money and directing such agent to make the payment. On the other hand it would, in my opinion, be going too far in the other direction to hold that the power had no application at all to the payment of trust moneys through an agent. Whether a particular case fell within the limits of the power would, I think, depend upon its circumstances. If it were as easy to make the payment direct as to make it through an agent, I do not think payment through an agent could be justified, for the trustee ought not on the strength of such a power to expose his cestui que trust to quite unnecessary risk. On the other hand, the power being obviously one inserted to relieve the trustee from what otherwise might be an arduous duty, no cestui que trust could object if the trustee relied upon it for that purpose. There may of course be cases where it is difficult to say certainly that what has been done is or is not within the limits of the power, but if the trustee has acted honestly, and if the Court is of opinion that an ordinary man might under the particular circumstances reasonably suppose that what he did was justified by the power, I think there would be a case for relief under the Judicial Trustees Act. In the present case it is certainly arguable that an executor is justified in entrusting his solicitor with the moneys required for the payment of duty. I cannot find that the case of *Castle* v. *Warland* (1), which apparently so decided, has been overruled. It is true that that case was decided at a time when the Commissioners of Inland Revenue only accepted payment in cash, whereas they now accept cheques. But I do not think this is necessarily conclusive that the case would now be otherwise decided, for it is a fact which no one but a lawyer could be expected to know. A layman might probably be quite unaware that the Commissioners were the persons to receive the payment. I am sure the defendant did not know this, though he had drawn cheques in favour of the Commissioners. Even in cases where the trustee knows to whom the money is payable he is sometimes justified in making the payment through his solicitor: *In re Bird.* (2) The point seems

(1) 32 Beav. 660.

(2) L. R. 16 Eq. 203.

to me to be one of doubt and difficulty; although no doubt, as a general rule, a trustee having to pay money to A. could not properly pay it to B. to be passed on to A., for this would multiply risks unnecessarily. Similarly it is, in my opinion, by no means certain that the particular clause in the will to which I have referred does not justify the payment of duty to a solicitor, even if such payments could not otherwise be properly made. Under these circumstances, can I say that the defendant acted unreasonably, having regard to the clause in the will, because at the request of his solicitor he entrusted him with moneys for the payment of duties which he was informed and believed were payable? I have come to the conclusion that I cannot. As the defendant himself said, what would be the use of employing a solicitor in such a case at all if you could not trust him? The solicitor was properly employed to ascertain the duties. He told the defendant he wanted a cheque to enable him to pay the duties, and I think the defendant was justified in believing what he was told, and that any ordinary man of business might reasonably come to the conclusion that, having regard to the terms of the will, he might safely pay the money to the solicitor.

Having come to this conclusion that the defendant has acted reasonably as well as honestly, and the case not being one in which the defendant ought to have come to the Court for advice, I think he is entitled to relief under the Act.

Solicitors: *Walters & Co.; Ll. C. Kirby-Turner, for John Wilson, Newcastle-upon-Tyne.*

H. C. R.

PARKER J.
1911
Jan. 24.

In re WHITFIELD.
HILL *v.* MATHIE.

[1910 W. 2902.]

Husband and Wife—Gift of Income during Widowhood—Subsequent Marriage with Deceased Sister's Husband—Effect of Marriage being validated by Statute—Deceased Wife's Sister's Marriage Act, 1907 (7 *Edw.* 7, *c.* 47), *ss.* 1, 2.

A man died in 1902 having by his will given his property upon trust to pay his wife the income thereof while she remained his widow, with a gift over on her death or second marriage. In 1904 she went through the ceremony of marriage with her deceased sister's husband, but this marriage was validated by s. 1 of the Deceased Wife's Sister's Marriage Act, 1907, which was passed and came into operation on August 28, 1907:—

Held, that the effect of s. 2 of the Act was that the plaintiff was still entitled to receive the income of the testator's property.

Semble, that although the Act renders valid as civil contracts previous marriages with deceased wives' sisters, it does not alter or interfere with any rights of property depending on those marriages not being valid.

Herbert Whitfield by his will, dated June 24, 1902, gave all his real and personal estate to trustees, upon trust to pay the net income of the realty to his wife, Kate Whitfield, "during her life if she shall so long remain my widow, and after the decease or second marriage of my said wife" he directed his trustees to sell the realty and pay and divide the proceeds of sale unto his child or all his children if more than one in equal shares as and when they should respectively attain the age of twenty-one years. And the testator thereby directed his trustees to sell his personal estate and, after payment of his debts and funeral and testamentary expenses, to invest the residue of the proceeds and pay the annual income to his said wife "during her widowhood, and after her decease or second marriage" he bequeathed the residue and investments to his or all his children if more than one as in the case of the proceeds of the realty.

The testator died on August 1, 1902, leaving him surviving his wife and one child only, called George Herbert Joseph Whitfield.

In 1904 the testator's widow went through the ceremony of marriage with one Hill, who had previously been married to and was then the widower of a sister of Mrs. Whitfield.

The trustees of the will paid the income of the testator's real and personal estate to his widow until shortly after the passing of the Deceased Wife's Sister's Marriage Act, 1907 (1), which received the Royal assent and came into operation on August 28, 1907, but afterwards refused to pay it to her on the ground that she was no longer the testator's widow. Mrs. Hill took out an originating summons, to which the trustees and the testator's son were defendants, for a declaration that she was still entitled to the income of the testator's real and personal property, and for an order on the trustees to pay her the arrears of the income and the future income. This summons was adjourned into Court.

Underhill, for the plaintiff. The marriage, or ceremony, with Hill was not a valid marriage at the time, as the plaintiff

(1) 7 Edw. 7, c. 47, s. 1. "No marriage heretofore or hereafter contracted between a man and his deceased wife's sister, within the realm or without, shall be deemed to have been or shall be void or voidable, as a civil contract, by reason only of such affinity . . . . Provided also that in case, before the passing of this Act, any such marriage shall have been annulled, or either party thereto (after the marriage and during the life of the other) shall have lawfully married another, it shall be deemed to have become and to be void upon and after the day upon which it was so annulled, or upon which either party thereto lawfully married another as aforesaid."

Sect. 2. "No right, title, estate or interest, whether in possession or expectancy, and whether vested or contingent at the time of the passing of this Act, existing in, to, or in respect of, any dignity, title of honour, or property, and no act or thing lawfully done or omitted before the passing of this Act shall be prejudicially affected nor shall any will be deemed to have been revoked by reason of any marriage heretofore contracted as aforesaid being made valid by this Act. And no claim by the Crown for duties leviable on or with reference to death, and before the passing of this Act due and payable, and no payment, commutation, composition, discharge, or settlement of account in respect of any duties leviable on or with reference to death before the passing of this Act duly made or given, shall be prejudicially affected by anything herein contained. Nothing in this Act shall affect the devolution or distribution of the real or personal estate of any intestate, not being a party to the marriage, who at the time of the passing of this Act shall be, and shall until his death continue to be, a lunatic, so found by inquisition."

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was his deceased wife's sister. The effect of s. 1 of the Act of 1907 was that the parties to that ceremony were legally married, but that section has nothing to do with the effect of the marriage on proprietary rights. At the time when the marriage was validated the plaintiff had a vested estate or interest in property within the meaning of s. 2 of the Act, which expressly provides that such an estate or interest shall not "be prejudicially affected" "by reason of any marriage heretofore contracted as aforesaid being made valid by this Act." The object of the Act was by validating existing marriages with deceased wives' sisters to take away from the children the stigma of illegitimacy, and perhaps to give to ladies who had chosen to mate with their deceased sisters' husbands a kind of brevet rank in society. What is the precise meaning of some parts of the Act may be difficult to ascertain, but it is clear that it did not intend to affect existing rights of property. Any other construction would lead to the absurd result that the gift over would have to be held to have taken effect retrospectively from the date of the ceremony with Hill.

Whitmore Richards, for the defendant Whitfield. The Court has to construe the will rather than the Act, and under the will the plaintiff is only to take the income while she remains the testator's widow. The effect of the Act certainly is that at any rate as from August 28, 1907, she was no longer a widow. It may be questioned whether she became a widow in 1907 or 1904, but it is not contended that she is to recoup income received between those dates. Probably the words of s. 2 which are relied on for the plaintiff were meant to protect a woman from having to repay moneys received prior to the passing of the Act.

[PARKER J. That seems to be done by the words "no act or thing lawfully done or omitted before the passing of this Act," and if so, what case is within the first words of the section if this case is not within them?]

It is difficult to answer that question offhand. There is no reported case on the Act, but in the somewhat similar case of a marriage being annulled after the date of a will giving the testator's wife an annuity "so long as she shall continue my widow and unmarried" it was held that as the person claiming

the annuity had never been the testator's wife she could never be his widow and that she was not entitled to the annuity: *In re Boddington.* (1) Some regard must be had to the manifest intention of the testator that the plaintiff should cease to take the income when she ceased to be his widow.

Austen-Cartmell, for the trustees. I adopt the argument on behalf of the testator's child, and it may be further contended that s. 2 only meant to protect the existing rights of third parties, and not those of the parties to the marriage validated by the Act. This construction is aided by the provision in the Act in favour of the Crown in respect of duties, and by the last sentence of s. 2. If the plaintiff's contention is acceded to, the right of the testator's son to have the property when the plaintiff ceased to be a widow will be prejudicially affected by the Act.

Underhill in reply. It must be remembered that the Legislature put an end to the widowhood without asking the plaintiff's leave to do so.

PARKER J. The question for determination in this case arises on the true construction of the Deceased Wife's Sister's Marriage Act, 1907. By his will the testator gave his real and personal estate to trustees on trust to pay the income to his wife during her widowhood, with a gift over on her death or second marriage. Some time after the testator's death the lady went through the form of marriage with the husband of her deceased sister; which, of course, was invalid according to the civil and ecclesiastical law then existing. She did not on that account cease to be the testator's widow; and the trustees continued to pay her the rents, profits, and income. In 1907 the Act in question was passed. [His Lordship read the first part of s. 1, and continued.] Then come certain provisions, to which I need not refer particularly, unless it be to the last proviso. [His Lordship read it, and continued.] Then comes s. 2, which raises the difficulty here. [His Lordship read s. 2.] It is to be observed that the words of this section are very large indeed; and whether it was intended or not, they are not expressly confined to the rights of third parties, nor is there anything to exclude

(1) (1883) 22 Ch. D. 597; (1884) 25 Ch. D. 685.

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the rights of the husband and wife. In my opinion the Legislature meant to say "Though we are rendering valid as a civil contract a previous marriage which was not valid at the time of its being entered into, we do not intend to alter or interfere with any rights of property depending on the marriage not being valid. Those are to remain unaffected; but as a civil contract the marriage is to be deemed to be valid." In the present case the lady had at the passing of the Act an estate for her widowhood in possession in the property subject to the will; and, in my opinion, the section provides that this estate is not to be prejudicially affected by the marriage being validated by the Act. This is only reasonable, for the parties to such marriages were not consulted when the Act was passed, and cases can be conceived where the whole provision for a lady's family might, but for this proviso, be taken away without consulting her, though the husband might be dead. If the Act were to have this effect, I should expect something in it containing such a provision; and I construe the section in the broadest possible way as preserving the lady's right, and hold that she is still entitled to the income.

Solicitors: *Maude & Tunnicliffe, for Dallow & Dallow, Wolverhampton; Wainwright & Co., for E. L. Feibusch, Wolverhampton; H. A. Sims, for Rhodes & Son, Wolverhampton.*

F. E.

In re SUMNER'S SETTLED ESTATES.

EVE J.
1910
Dec. 13, 20.

[1910 S. 3624.]

[MANCHESTER DISTRICT REGISTRY.]

Settled Land—Limited Owner—Powers of Tenant for Life—Trustees—Powers of Management—Widow entitled to Surplus Rents during Widowhood—"Forfeiture"—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 58, *sub-s.* 1, *clauses* (*vi.*), (*ix.*).

By his will, made in 1903, a testator devised all his real estate of every tenure unto and to the use of trustees upon trust that they should, out of the rents and profits thereof, and until the expiration of ten years after his death, or until the death or marriage again of his wife, whichever should be the longer period, pay certain annuities, and the costs and expenses of management of his estate, and should pay the ultimate residue of the rents and profits to his wife during her widowhood. Full powers of management were conferred upon the trustees by the will. The testator died in 1907. Upon a summons by the widow to determine whether she was a tenant for life, or had the powers of a tenant for life, under the Settled Land Acts in respect of the real estate settled by the will:—

Held, that she was a person entitled to the income of land under a trust for payment thereof to her during her life, or until forfeiture of her interest therein on her remarriage, and as such had the powers of a tenant for life under clause (ix.) of sub-s. 1 of s. 58 of the Settled Land Act, 1882.

The word "forfeiture" in clause (ix.) must be construed to include cesser, or determination on bankruptcy, alienation, remarrying, or any other event.

In re Baroness Llanover, [1907] 1 Ch. 635, distinguished, and the *semble* in the head-note discussed.

ADJOURNED SUMMONS.

By his will, dated April 1, 1903, Francis John Sumner, of Eathorpe Park, in the county of Warwick, appointed his wife Frances, and his sons Francis George and Alfred Bernard, and Theodore Walter Ellison to be executors and trustees thereof, and, after various directions and specific and pecuniary bequests, he devised all his real estate of every tenure, including chattels real, but as to copyhold or customary hereditaments in default of and subject to any appointment under a power thereinbefore contained, unto and to the use of his trustees, their heirs, executors, and administrators respectively, according to the

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tenure thereof, upon trust that his trustees should, out of the rents and profits arising therefrom, and until the expiration of ten years next ensuing after his death, or until the death or marriage again of his said wife, whichever should be the longer period, pay certain annuities, or yearly sums, therein mentioned, and upon further trust that his trustees should, out of the residue of the said rents and profits, pay all expenses incidental to the payment of such annuities, and all costs, charges, and expenses of management of his estate as thereinafter directed, and should pay the ultimate residue of the said rents and profits to his wife during her widowhood, provided always and the testator directed that, if his wife should die before the expiration of ten years from his decease, the trustees should, during the remainder of the said period of ten years, accumulate the surplus rents and profits arising from the said estate at compound interest by investing the same as therein mentioned, and should stand possessed of such accumulation as part of and upon the trusts thereinafter declared concerning his residuary trust estate. And the testator directed that at the expiration of the period of postponement of conversion the trustees should sell and convert into money the real, copyhold, customary, and leasehold estates at such times and in such manner as they thought fit, with fullest power of postponement, and should out of the proceeds pay and discharge any existing mortgages or incumbrances, and should hold the ultimate residue upon the trusts therein mentioned for all his children in equal shares; and the testator declared that his trustees should have the fullest power of letting or demising any real, copyhold, customary, or leasehold property for the time being remaining unsold, either for a term of years, or from year to year, or for shorter periods, and should have power to accept surrenders of leases, and generally, in their absolute discretion, and as if they were absolute owners, to manage and cultivate the freehold, copyhold, customary, and leasehold hereditaments, until the same should be sold.

The testator died on February 24, 1907, and the respondents to the summons were two of the trustees and executors who proved the will.

At the date of his death the testator was possessed of various

real estates, including one called the Park Hall Estate, and an intending purchaser of a portion of that estate took the objection that the widow, Frances Sumner, was not a person having the powers of a tenant for life under the Settled Land Acts in respect of the estates of the testator settled by his will, and could not make a good title to any portion of such estates. Various sales had been effected and some sixteen leases and agreements granted and arranged by the widow since the testator's death.

On December 1, 1910, the widow took out an originating summons against the other two trustees of the will for the determination of the Court whether, under the said will, she was a person who was a tenant for life whose estate was liable to cease in an event during her life, by expiration of the estate, or otherwise, and was subject to a trust for accumulation of income for the payment of debts, or other purpose, within the meaning of the Settled Land Act, 1882, s. 58, sub-s. 1, cl. (vi.), or was a person entitled to the income of land under a trust or direction for payment thereof to her during her life, subject to expenses of management, or until forfeiture of her interest therein on bankruptcy or other event, within the meaning of clause (ix.) of the same sub-section, and whether, as such person, or otherwise, she had the powers of a tenant for life under the Settled Land Acts, 1882—1890, in respect of the estates settled by the will of F. J. Sumner.

P. O. Lawrence, *K.C.*, and *J. A. Tweedale*, for the applicant. The widow has the powers of a tenant for life, if not under clause (vi.), at any rate under clause (ix.). A doubt has arisen having regard to the *semble* in the head-note to the case of *In re Baroness Llanover* (1), but we submit that the *semble* is not really warranted by the decision. In that case, however, there were two points which distinguish it from the present, namely, that the applicant's interest there was not in possession, but in reversion, and consequently s. 58 did not apply at all; and, further, the applicant's interest arose under a partial intestacy, and she was not therefore entitled under a trust or direction for payment to her. Here the widow is entitled to receive the income, but there is no

(1) [1907] 1 Ch. 635, 636.

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express gift to her. [They also referred to Co. Litt., i. 42a, as to the meaning of a determinable life interest.]

R. H. Norton, for the trustees of the will.

Cur. adv. vult.

Dec. 22. EVE J. delivered the following written judgment:—By his will, dated April 1, 1903, the testator devised all his real estate of every tenure, including chattels real, unto and to the use of trustees, upon trust that the trustees should, out of the rents and profits arising therefrom, and until the expiration of ten years next ensuing after his death, or until the death or marriage again of his wife, whichever should be the longer period, pay the annuities or yearly sums therein mentioned, and all expenses incidental to the payment of such annuities, and all costs, charges, and expenses of management of his estate, and should pay the ultimate residue of the said rents and profits to his said wife during her widowhood. By the will full powers of management are conferred upon the trustees.

The testator died on February 24, 1907, and this summons has been issued by his widow for the purpose of determining whether she is tenant for life of, or has the powers of a tenant for life under the Settled Land Acts in regard to, the real estate so settled by his will.

The widow's interest is a life interest in possession in the surplus rents and profits, determinable on her remarriage.

Although, under sub-s. 10 (i.) of s. 2 of the Act of 1882, "possession includes receipt of income," the widow is not in the position of a person "beneficially entitled to possession of settled land," and is not, therefore, tenant for life thereof, within sub-s. 5 of the same section: *In re Atkinson.* (1)

Accordingly, if she is to succeed upon this summons, she must bring herself within s. 58, and clauses (vi.) and (ix.) of sub-s. 1 of that section are relied on as applicable to her position.

In holding, as I do, that she comes within clause (ix.) I do not wish to be understood as deciding that she could not be brought within clause (vi.). The decision of Farwell J. in *In re Drinkwater's Settled Estates* (2) would seem to shew that she might be,

(1) (1886) 31 Ch. D. 577, 581.

(2) (1905) 49 Sol. J. 237.

but for the present purpose it is enough for me to determine that she is a person entitled to the income of land under a trust for payment thereof to her during her life, or until forfeiture of her interest therein on her remarriage.

I do not think this conclusion involves any strained or unnatural construction of the word "forfeiture" having regard to the context in which it is found. Of the words "forfeited," "to forfeit," and "forfeiture," Coke upon Littleton in vol. 1, 59a, says: "This adjective (i.e. forfeited) in Latine is *forisfactus*—the verbe is *forisfacere* and the nowne *forisfactura*. They are all derived of *fores*, that is, *extra* and *facere*, *quasi diceret*, *extra legem seu consuetudinem facere*, to do a thing against or without law or custome; and that legally is called a forfeiture." But it is a word which is not infrequently used in a sense other than its strict legal sense, and is one of which the construction may depend upon the context. This is shewn by the judgment of Kay J. in *In re Levy's Trusts* (1), and in construing it in this section I agree with a learned commentator who writes (2): "It is inconceivable that the Legislature intended that a person whose life interest in the surplus income of land is liable to be forfeited by bankruptcy should have the powers of a tenant for life, but that a person to whom the trustees are directed to pay the surplus income until he becomes bankrupt should not." I think that the word is here used with the meaning assigned to it in the Imperial Dictionary (3), where it is said "in regard to property 'forfeiture' is a loss of the right to possess;" and that it includes cesser, or determination on bankruptcy, alienation, remarriage, or any other event.

It remains for me to point out that this decision is not in accordance with the *semble* in the head-note of *In re Baroness Llanover*. (4) The *semble* is as follows: "*Semble* clause (vi.) does not apply to a person merely entitled to receive surplus rents from trustees who are in possession and managing the estates, and clause (ix.) does not apply (*a*) to a terminable life interest or (*b*) to any interest taken under an intestacy, though

(1) (1885) 30 Ch. D. 119.
(2) (1908) 52 Sol. J. 512.
(3) From Webster's Dictionary: not in the current edition of the "Imperial."
(4) [1907] 1 Ch. 635.

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comprised in the subject of the settlement under s. 2, sub-s. 2."

This *semble* so far as it relates to clause (ix.) is founded upon the observations of the learned judge on p. 650 of the report. In considering these observations it must be borne in mind that the applicant's interest was not in possession, but in reversion expectant on the determination of the trust for accumulation, and she was not, therefore, a person to whom s. 58 could have any application. Moreover, the learned judge was of opinion that inasmuch as the interest would arise in consequence of a partial intestacy the applicant would not be entitled to the income under any trust or direction for payment thereof to her. There were, therefore, at least two sufficient grounds for deciding against the applicant, apart altogether from the question as to the determinable nature of her interest, and I think the observations upon this point on p. 650 of the report must be read with those on p. 648, where the learned judge points out that the applicant's interest was not measured in any way by her own life, and that, for the purpose of considering her interest, the duration of her own life was an immaterial factor. So read, it may be that they do not warrant the *semble* added to the head-note, but even if it should be otherwise, I do not consider the point was so far determined as to preclude me from coming to a different conclusion in a case where the title of the applicant depends solely upon the question whether the determinable nature of the interest disqualifies her from exercising the powers which she claims a statutory right to exercise. Accordingly, I answer the question raised by the summons by declaring that the applicant has the powers of a tenant for life under clause (ix.) of sub-s. 1 of s. 58 of the Act of 1882, and I order the costs of all parties to be taxed as between solicitor and client, and to be raised and paid out of the capital of the settled estate.

Solicitors for all parties: *Ellison & Jones, Glossop.*

G. M.

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In re MASTER'S SETTLEMENT.
MASTER *v.* MASTER.

[1910 M. 2673.]

Settlement—Power of Appointment—Cesser of Life Interest of Husband on Bankruptcy—Trust Fund vested — Absence of Express Provision as to Income—Children of Marriage entitled pending Appointment.

By a marriage settlement, dated September 4, 1878, a sum of 10,000*l.* was settled upon trust for the wife for life, and after her death, in the events which happened, upon trust for the husband for life, or until he should become bankrupt, and subject as aforesaid the trustees were to hold the said sum and the income thereof upon trust for the children or other issue of the marriage as the spouses should by deed jointly, or as the survivor should by deed or will, direct and appoint, and in default of appointment for all the children who, being sons, should attain twenty-one, or, being daughters, should attain that age or marry, in equal shares. The wife died in 1905, and in 1906 the husband, who had left for Australia many years before, was adjudicated bankrupt. There were three children of the marriage, all of whom had attained twenty-one, and one of them was married and had three infant children. So far as was known to the trustees, no appointment had been executed under either of the powers contained in the settlement.

Upon a summons by the trustees of the settlement to obtain directions as to how they should deal with the income of the settled property during the life of the husband and pending the exercise of the subsisting power of appointment:—

Held, upon the authority of *Coleman* v. *Seymour*, (1748) 1 Ves. Sen. 209, that the income of the trust fund was distributable in equal shares amongst the children of the marriage until and unless they were superseded by the exercise of the power.

ADJOURNED SUMMONS.

By a marriage settlement dated September 4, 1878, made on the marriage of Henry Hugh Master and Alice Ella Coaks, a sum of 10,000*l.* was settled upon trust for Alice Ella Coaks for life, and after her death, in the events which had happened, upon trust for Henry Hugh Master for life, or until (inter alia) he should become bankrupt, and subject as aforesaid the trustees were to stand possessed of the said sum and the income thereof in trust for the children or other issue of the intended marriage, as the spouses should by deed jointly, or as the survivor should by deed or will, direct or appoint, and in

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default of appointment for all the children of the marriage who, being sons, should attain twenty-one, or, being daughters, should attain that age or marry, in equal shares. The settlement contained the usual hotchpot clause. The wife died on February 5, 1905, and on August 11, 1906, the husband, who left the country many years ago and was now in Australia, was adjudicated bankrupt.

There were three children of the marriage, the respondents Bertram Hugh Master, Humphrey Claude Master, and Dudley Cyril Master, all of whom had attained twenty-one, and one of whom, Humphrey C. Master, was married and had issue, the respondents Violet Sylvia Master, Humphrey Ronald Master, and Ellen Joyce Master.

No joint appointment was ever made by Henry Hugh Master and Alice Ella Master of the capital or income of the trust fund under the powers of the settlement, and no notice had been received by the trustees of any appointment by Henry Hugh Master since the death of Alice Ella Master; but it was admitted that the husband's power of appointment was still subsisting, notwithstanding the cesser of his life interest.

On October 11, 1910, a summons was taken out by the trustees of the settlement to have the question determined how, in the absence of and until any appointment by Henry Hugh Master under the powers of the settlement, the income of the settled property arising since his bankruptcy ought to be paid and applied by them during the residue of the life of Henry Hugh Master.

A. C. Nesbitt, for the trustees of the settlement. No express provision has been made by the settlement as to the payment of the income of the trust fund in the events which have happened. Nor is there any direct authority bearing upon the present case. Clauses to provide for a contingency such as has occurred in this case are to be found in Davidson's Conveyancing Precedents, 3rd ed. vol. iii., pt. ii., p. 799, and in Wolstenholme's Forms and Precedents, 5th ed. p. 77.

F. A. Milne, for the children of the marriage. The children are entitled to the income of the fund until any appointment is

made by the husband under the power in the settlement. They have clearly vested interests in the settled fund liable to be divested upon any appointment being made, and any such appointment will only operate from the date when it is made.

[EVE J. referred to *In re Aylwin's Trusts.* (1)]

The general principle upon which the Court acts appears from the cases of *Lambert* v. *Thwaites* (2) and *Coleman* v. *Seymour.* (3)

H. M. Broughton, for the grandchildren. The income of the fund should be accumulated by the trustees to await any appointment that may be made, otherwise a difficulty might arise by reason of the hotchpot clause. The case of *Haswell* v. *Haswell* (4) is very similar in its facts to the present.

Cur. adv. vult.

Dec. 21. EVE J. delivered the following written judgment:— This summons raises a question on which there would appear to be no direct authority. It may be succinctly stated as follows: "How, in the absence of any express provision for its application, ought the income of a trust fund to be dealt with after the cesser of a life interest, and pending the exercise of a subsisting power to appoint the trust fund and income?"

The following are the material facts. [His Lordship stated the facts, and continued.] So far as is known to the trustees no appointment has been executed under either of the powers contained in the settlement, but it is not disputed that the husband's power to appoint is subsisting, notwithstanding the cesser of his interest: *Parsons* v. *Parsons* (5); *Wickham* v. *Wing.* (6) The trustees have issued this summons for the purpose of obtaining directions as to how they ought to deal with the income of the settled property during the residue of the life of the husband and until the exercise by him of any power of appointment thereunder.

The same question cropped up in very similar circumstances

(1) (1873) L. R. 16 Eq. 585.
(2) (1866) L. R. 2 Eq. 151.
(3) 1 Ves. Sen. 209.
(4) (1860) 2 D. F. & J. 456, 460, 462.
(5) (1744) 9 Mod. 464.
(6) (1865) 2 H. & M. 436.

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in the cases of *Haswell* v. *Haswell* (1) and *In re Aylwin's Trusts.* (2) In the former case the difficulty was disposed of by the construction put upon the settlement whereby it was held that the husband's power to appoint determined with the cesser of the life interest, but in the course of the argument Campbell L.C. observed (1): "The difficulty in Mr. Selwyn's construction" (i.e., that the power to appoint still subsisted) "is that it is impossible to say what is to be done with the fund in the interval between the death of the wife and an appointment by the surviving husband," and in the course of his judgment he adds (1): "Upon the construction contended for by the appellant, no satisfactory answer could be given to the question 'what was to become of the fund between the death of the wife and an appointment to be afterwards made by the husband?' One suggestion was, that the fund should accumulate, but, although such an accumulation would not be in contravention of the Thellusson Act, it is impossible to suppose that any such accumulation was in the contemplation of the parties to the deed. Then it was said that it would be the duty of the husband to exercise his power of appointment immediately on the death of the wife, but how was he to be compelled to perform this duty? The interest of the husband being forfeited, and the wife being dead, what can the trustees do but divide the fund among the children and grandchildren, as in default of appointment?" In *In re Aylwin's Trusts* (2), where a fund in Court represented rents accrued between the date of the cesser of the life interest and the hearing of the petition, Sir John Wickens V.-C. stated that the fund was legally in the same position as if then in the trustees' hands, and was still subject to the power, and he directed that the donee of the power might either then exercise the power, or decline to do so with regard to the fund, in which latter case the fund was to go as in default of appointment.

In the present case the children of the marriage claim to have the income distributed amongst them. On behalf of the remoter issue it is argued that it ought to be accumulated.

In determining which of these two contentions ought to prevail I hope I am not attempting what the Lord Chancellor

(1) 2 D. F. & J. 456, 460, 462. (2) L. R. 16 Eq. 585.

said was impossible, still more that I am not appearing to rush in where he and others of greater learning and wider experience have not seen fit to tread.

In my opinion, the argument on behalf of the children ought to prevail: their interests in the settled fund are vested interests subject to being divested by the exercise of the power: *Doe* v. *Martin* (1); *Lambert* v. *Thwaites* (2); and although the existence of the power necessarily precludes the immediate division of the capital, I cannot see any principle on which the same result should follow in the case of the current income. Until the right to receive this is intercepted by the donee of the power I think the trustees are bound to pay it to those in whom the capital by which it is produced is for the time being vested. To read into the settlement a trust to accumulate is, in my opinion, impossible, and the only alternative is distribution amongst those entitled to the corpus, until and unless they are superseded by the exercise of the power.

I think the case of *Coleman* v. *Seymour* (3) is an authority supporting the view I take. There a sum of 3000*l.* was bequeathed to Jane Coleman "for the use of her younger children, to be by her distributed among them in such manner, shares, and proportions, as she shall think fit; and if no appointment was made by her, then equally to be divided among her younger children." Questions having arisen as to when the class of younger children was to be ascertained, and who were included in the class, the action was brought to determine those questions, and incidentally the further question was raised as to what was to be done with the interest on the legacy pending the exercise by Jane Coleman of her power of appointment.

Lord Hardwicke disposes of this last question at the end of his judgment in these terms (4): "This being a present legacy, and vested, the interest shall not accumulate, but go in mean time among those entitled to the principal for maintenance, till the mother executes the appointment; which she may still do in a reasonable proportion."

As I say, I think that decision supports the opinion at

(1) (1790) 4 T. R. 39.
(2) L. R. 2 Eq. 151.
(3) 1 Ves. Sen. 209.
(4) Ibid. 210.

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which I have arrived in this case, and if I am right in holding that the children of the marriage are indefeasibly entitled to the accruing income until an appointment is made, I do not see how any difficulty arises out of the hotchpot clause. The subject-matter for appointment is the corpus and the income accruing from the date of the appointment.

I therefore hold that the income to which the summons refers is distributable in equal shares amongst the children of the marriage, and I direct the costs of all parties to be taxed as between solicitor and client, and to be paid and retained out of the capital subject to the trusts of the settlement.

Solicitors for all parties : *Master, Hussey & Master, for Rackham & Sayer, Norwich.*

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WOODBRIDGE & SONS *v.* BELLAMY.

[1910 W. 3039.]

Solicitor—Agreement of Service—Restrictive Undertaking—Carrying on the Profession of a Solicitor—Construction—Breach—Letter written outside the prohibited Area to a Person within it—Injunction.

The defendant, an admitted solicitor, signed an agreement of service with the plaintiffs, a firm of solicitors carrying on business in London and at Brentford, whereby, in consideration of their employing him as their conveyancing clerk and representative advocate at Brentford at a stated salary, the defendant undertook that he would not, at any time during his employment, or after the determination thereof, "carry on within a radius of five miles of the town hall, Brentford, the profession of a solicitor." After the termination of the engagement the defendant, who had started business as a solicitor in London, wrote from his office in London, on behalf of a client residing within the prescribed radius, to a person also residing within the radius, demanding payment of a debt due to his client. The recipient of the letter, who was not in fact the debtor, as the result of the correspondence which ensued, bought up the debt, and the defendant, who acted as solicitor for both parties, received a payment for his services. Upon motion for an interlocutory injunction to restrain the defendant from infringing the restrictive condition :—

Held (reversing the decision of Eve J.), that there had been no breach of the agreement and that an injunction ought not to be granted.

MOTION.

The plaintiffs, Messrs. Woodbridge & Sons, were solicitors

carrying on business at 5, Serjeants' Inn, Fleet Street, in the city of London, and at Brentford.

The defendant, William Henry Bellamy, was also a solicitor, carrying on business at an office in the Strand, London, and residing at Brentford. He first got into communication with the plaintiffs through an advertisement in the *Law Times* in March, 1902. He was an admitted solicitor at that time, with considerable experience. On March 29, 1902, at an interview with the junior partner of the plaintiffs' firm he was engaged as conveyancing clerk and to take charge of county court work at Brentford at a salary of 140*l.* per annum, together with an allowance in respect of travelling expenses, subject to his references being satisfactory. On April 4, 1902, the plaintiffs wrote to the defendant engaging his services to commence from April 17.

On April 16, 1902, the defendant signed an agreement of service as follows:—

"In consideration of your agreeing to employ me in your business as solicitors at your offices at No. 5, Serjeants' Inn, Fleet Street, in the city of London, and No. 209, High Street, Brentford, Middlesex, in the capacity of conveyancing clerk at both offices, and representative advocate at Brentford, at a salary of 140*l.* per annum, I hereby undertake and agree that I will not, at any time during my employment, or after the determination thereof, (1.) divulge or disclose to any person or persons the secrets or information entrusted to me, or arising or coming to my knowledge in the course of my employment or otherwise, either in or relating to the business dealings and transactions of yourselves, or of any of your clients, or (2.) carry on within a radius of five miles of the town hall, Brentford, aforesaid, the profession of a solicitor, either in my own name or in the name of any other person, or persons, and either directly, or indirectly, and will not enter into the service of any other person, or persons, as assistant, or otherwise in or in relation to the said profession, within the limit aforesaid; and will not endeavour or attempt, directly, or indirectly, to induce any person, or persons, to cease from employing you in the way of your profession or business."

The defendant accordingly took up his residence at Brentford,

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and acted under the agreement until March, 1909, when it was terminated by the plaintiffs, who gave him three months' salary. In October, 1910, the defendant wrote to the plaintiffs asking them to release him from his undertaking, but they declined.

There was evidence that a letter was written on October 25, 1910, by the defendant from his London office to a Mr. A. J. Evans, living at Ealing (within the prohibited area), saying that he (the defendant) had been consulted by his client, Mr. Bradbury, of Brentford, with regard to a debt of 107*l.* 6*s.* 3*d.* owing to him by a Mr. Carlton, of Ealing, lately deceased. The defendant believed that Mr. Evans was the executor of the deceased's will, and stated that he required payment of this debt or else proceedings would be taken for the administration of the estate. Other letters followed, and it appeared Mr. Evans was only the husband of one of the legal personal representatives of Mr. Carlton. This debt was subsequently purchased by Mr. Evans for 87*l.* and duly transferred to him, the defendant being paid a sum of 1*l.* 11*s.* 6*d.* for the costs of the assignment, and acting as solicitor for both parties. Both Mr. Bradbury and Mr. Evans had been former clients of the plaintiffs.

On November 22, 1910, the plaintiffs gave notice of motion for an injunction to restrain the defendant, until the trial of the action or further order, from carrying on, within a radius of five miles from the town hall of Brentford, the profession of a solicitor, &c., following the words of the restrictive condition. The motion came on for hearing before Eve J. on December 2, 1910.

P. O. Lawrence, K.C., and *T. Ribton*, for the plaintiffs. There has been a breach of the restrictive undertaking by the defendant by the writing of letters to a person within the prohibited area: *Edmundson* v. *Render*. (1) In that case the acts were held to be done at the places where the letters were received.

The first defence raised is that the document is a nudum pactum, as no consideration was given for it. But the engagement of service was inchoate and not in fact concluded until April 16, 1902, when the document was signed. The consideration is

(1) [1905] 2 Ch. 320.

stated in the document itself and is, in effect, the continuing the employment of the defendant in the plaintiffs' business. A legal consideration of any value is sufficient to support such a contract as this, and the Court will not inquire into the quantum: *Norton* v. *Powell* (1); *Mumford* v. *Gething* (2); *Gravely* v. *Barnard*. (3) A second defence is that the restriction is too wide and was more than was reasonably necessary for the protection of the plaintiffs. But a similar covenant in restraint of trade was held not unreasonable in the case of *Haynes* v. *Doman*. (4) Nor can it now be successfully argued that it is unreasonable on the ground that it is unlimited in point of time: *Dendy* v. *Henderson* (5); *Duignan* v. *Walker* (6); *Howard* v. *Woodward* (7); *May* v. *O'Neill*. (8)

Clayton, K.C., and *C. E. Bovill*, for the defendant. We submit (1.) there is no consideration for the undertaking. (2.) The restriction is too wide. (3.) There has been no breach of the undertaking at all.

As to the first point, the cases relied on by the plaintiffs do not touch it. Here there was a definite concluded engagement on April 4, 1902, which could be enforced by both parties. After signing the document of April 16, 1902, the defendant was in no better position than before. The law requires that there shall be adequate consideration for such a contract as this, and the consideration here was purely illusory and quite insufficient to support the agreement. The Court will not imply that the plaintiffs would not have continued to employ the defendant unless he had signed the agreement of service. It was therefore a nudum pactum.

On the second point we submit that the restriction was too wide in that the defendant was employed in certain definite branches of business only, and the restriction is against his acting as a solicitor generally, and is not confined to the particular branches in which he was employed. We do not rely upon the ground that the restriction was unlimited in point of time. Nor can it

(1) (1842) 4 Man. & G. 42.
(2) (1859) 7 C. B. (N.S.) 305.
(3) (1874) L. R. 18 Eq. 518.
(4) [1899] 2 Ch. 13.
(5) (1855) 11 Ex. 194.
(6) (1859) 28 L. J. (Ch.) 867.
(7) (1864) 34 L. J. (Ch.) 47.
(8) (1875) 44 L. J. (Ch.) 660

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be now contended before this Court of first instance that it was unreasonably wide because not confined to the time during which the covenantees, or their successors, carried on business. The whole agreement is unreasonable, but if not, the undertaking is severable, and can be enforced only as to that part which is reasonable: *Baines* v. *Geary* (1); *Henry Leetham & Sons, Ld.* v. *Johnstone-White.* (2)

Thirdly, there has been no breach. The mere writing of a letter by the defendant from his London office into the prohibited district cannot be a "carrying on" of his profession of a solicitor. It cannot be seriously contended that a solicitor "carries on" his business in every part of the world to which he, or his clerk, may write a letter. In the case of *Edmundson* v. *Render* (3) the defendant undertook not "to do any work or act" usually done by solicitors. That was a totally different covenant. Here it is to "carry on" the profession of a solicitor, that is, to perform a sequence of continuous acts, and it cannot be carried on by doing one thing only. This covenant is therefore not reasonably necessary for the protection of the covenantee: *E. Underwood & Sons, Ld.* v. *Barker.* (4) The cases arising under the Money-lenders Act, 1900 (63 & 64 Vict. c. 51), as to what "carrying on business" means, support our contention, such as *Kirkwood* v. *Gadd.* (5)

[EVE J. referred to the case of *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.* (6)]

P. O. Lawrence, K.C., in reply. The case of *Jacoby* v. *Whitmore* (7), where *Elves* v. *Crofts* (8) was approved, would be fatal to any contention that the restriction was unreasonable because not confined to the time when the covenantees or their successors carried on business. There has been, on the evidence, a prima facie breach of the agreement. The cases under the Money-lenders Act, 1900, do not apply, as the object of that Act was to preserve the identity of the money-lender, so that borrowers might know with whom they were dealing.

(1) (1887) 35 Ch. D. 154, 156.
(2) [1907] 1 Ch. 189, 322.
(3) [1905] 2 Ch. 320.
(4) [1899] 1 Ch. 300.
(5) [1910] A. C. 422, 438.
(6) [1894] A. C. 535, 563, 572.
(7) (1883) 32 W. R. 18.
(8) (1850) 10 C. B. 241.

Brampton v. *Beddoes* (1) shews that a breach of the covenant was committed within the prescribed district. As to the meaning of the term to "carry on," it is a flexible expression, as was stated in *Turner* v. *Evans* (2), but a profession cannot be "carried on" except by doing acts: *Palmer* v. *Mallet*. (3) There is a difference between carrying on a profession or business and carrying on a trade. The plaintiffs are entitled to the interlocutory injunction which is asked.

EVE J., after stating the preliminary facts, continued:—The action is based on the document of April 16, 1902, and the alleged breach of its terms by the defendant. The defendant sets up by way of defence that the document was executed without any consideration moving to him from the plaintiffs; that it is too wide in its terms; and that he has not, in fact, committed any breach entitling the plaintiffs to the injunction they are claiming.

The first point I have to determine is whether the document constituted a term of the defendant's engagement by the plaintiffs. Certain correspondence had preceded the execution of the document, from which it appears that Messrs. Woodbridge & Sons had expressed their willingness, if the defendant's references were satisfactory, to engage his services at a salary of 140*l*., with an allowance for a season ticket from Brentford to London, and their desire that he should enter upon his duties at as early a date as possible. The references having proved satisfactory, the plaintiffs on April 4 wrote to the defendant a letter wherein they say: "We shall be glad to engage your services, and to have the benefit of them at the earliest moment. We understand from your letter of the 1st that you can be with us on the 17th. We shall be glad if you will be here on that date, accordingly." On the 16th the defendant came up to London and had a short interview with the junior partner in the plaintiff firm. At that interview this document of April 16 was put before him. I need not read it all, but it is addressed to Messrs. Woodbridge & Sons, dated April 16, and begins with these words:

(1) (1863) 13 C. B. (N.S.) 538. (2) (1852) 2 D. M. & G. 740, 745.
(3) (1887) 36 Ch. D. 411, 422.

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"In consideration of your agreeing to employ me in your business as solicitors at your offices at No. 5, Serjeants' Inn, Fleet Street, in the city of London, and No. 209, High Street, Brentford, Middlesex, in the capacity of conveyancing clerk at both offices, and representative advocate at Brentford, at a salary of 140*l.* per annum, I hereby undertake and agree that I will not at any time during my employment or after the determination thereof . . . . (2.) carry on, within a radius of five miles of the town hall, Brentford, aforesaid, the profession of a solicitor, either in my own name, or in the name of any other person, or persons, and either directly or indirectly." That was the document put before the defendant and which he signed, and in this connection it is not unimportant to bear in mind that although he was about to enter the employ of the plaintiffs and might in one sense be said to be thereby placed at a disadvantage, he was an admitted solicitor quite competent to negotiate on his own behalf and, needless to say, quite alive to the nature of the document he was being asked to sign. The document says in terms that it is "in consideration of your agreeing to employ me," and upon the evidence as it stands, and bearing in mind what I have just said, I do not think the defendant can successfully contend that this document did not form part of the contract of service into which he was then entering with the plaintiffs. Assuming, however, that he could, at the trial, bring forward evidence that, prior to the signing of this document, there was a concluded contract by which Messrs. Woodbridge & Sons were bound to employ him at the salary and upon the terms expressed in the letters, the further question would then arise whether, in view of the position subsisting on April 16, the Court ought not to infer a sufficient consideration to support this document. The plaintiffs regarded the execution of the document as an absolutely necessary condition precedent to their allowing the defendant access to their business and clients, and I think in that state of things I should be bound to infer that if the defendant had refused to sign, and had asserted his right to be employed on the terms contained in the letters, the plaintiffs would have taken the earliest opportunity of determining the relationship between them and the defendant, and indeed would

have taken good care that while he was in their office the defendant should not obtain that access to their clients and business which they contemplated giving him and which they in fact gave him, as soon as he had executed the document. I think, therefore, even if I came to the conclusion that this did not in fact form part of the agreement of service, that I should be bound to hold that there was sufficient consideration to support the contract, although entered into subsequent to, and when there was still subsisting, an existing contract of service. I hold therefore that the defendant has not established his first ground of defence.

[His Lordship then dealt with the question whether the restrictions imposed were too wide and decided that they were not.]

Then comes the final defence that there has been no breach of the agreement. Upon that, forcible arguments have been addressed to me as to the meaning which I ought to attach to the words "carrying on the profession of a solicitor within a radius of five miles of the town hall, Brentford." I think the expression "carry on" in connection with any business or profession is necessarily of an elastic character. Knight Bruce L.J. thinks it "a flexible expression," and that strikes me as a very adequate and accurate description.

Now the material facts in this case are as follows. The defendant resides within the five-mile radius; he has an office in the Strand at which undoubtedly he carries on his business, and which is of course situate considerably more than five miles from the town hall, Brentford. But, in the course of his business, he has been consulted—I will assume in the Strand—by a gentleman resident within the radius, and, on behalf of that gentleman, he wrote to the person whom he thought was the legal personal representative of a deceased debtor of the gentleman in question. The person so written to also resided within the radius; he was not in fact the legal personal representative of the debtor, but was the husband of one of the legal personal representatives, and the correspondence between him and the defendant resulted in this, that in order to settle the matter he ultimately agreed to buy the claim of the creditor against the deceased at a discount. In order to carry that agreement into

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effect the defendant, acting as solicitor both for the vendor and the purchaser of the debt, both, as I have said, living within the radius, prepared an assignment to the purchaser of the debt, got it executed by the creditor, stamped it, and was duly paid for his services. That is the breach upon which the plaintiffs rely. Mr. Clayton contends that such conduct is not really carrying on the business of a solicitor within the radius. I cannot accede to that contention. A solicitor more or less carries his profession about with him. Wherever he does work of a professional nature for which he is paid, he is in my opinion practising and carrying on the profession of a solicitor. In carrying out for reward the transaction between two residents within the radius the defendant was in my opinion acting as a solicitor, that is, carrying on his profession within the radius, and I think the defendant has thereby committed a breach of the agreement. In these circumstances I propose to grant an injunction, following the words of the first sentence in clause 2 of the agreement, until judgment or further order.

G. M.

C. A.

The defendant appealed. The appeal came on for hearing on January 12, 1911.

Clayton, K.C.; and *C. E. Bovill*, for the defendant. First, there was no breach by the defendant of the restrictive undertaking. Secondly, there was no consideration for the contract. Thirdly, the contract was too wide. Upon the first point all that the evidence establishes is that the defendant was consulted by a client at his office in London, which was outside the prohibited area, and on behalf of that client wrote a letter to a person within the prohibited area demanding payment of a debt. That is not carrying on business within the prohibited area.

[They were stopped.]

P. O. Lawrence, K.C., *A. Grant, K.C.*, and *T. Ribton*, for the plaintiffs. "Carry on" in covenants of this kind is equivalent to "pursue" or "prosecute," and whenever a man does a professional act within a particular district he is carrying on his profession within that district: *Turner* v. *Evans*. (1) A

(1) 2 D. M. & G. 740; (1853) 2 E. & B. 512.

profession differs from a business because a man carries his profession about with him. Suppose the defendant had sued for his client's debt in the Brentford County Court, it could not be said that he was not carrying on his profession within the prohibited area, and the result would be the same if, instead of suing the debtor, he interviewed him and threatened him with legal proceedings. Then does it make any difference if, instead of a personal interview, he communicates with him by letter? *Edmundson* v. *Render* (1) supplies the answer to that question. It was there held that if a solicitor on behalf of a client writes a letter to a person within the prohibited area demanding payment of a debt he is acting as a solicitor within that area; and if a man acts as a solicitor he is carrying on the profession of a solicitor.

[COZENS-HARDY M.R. The Stamp Act, 1891, in fixing the fee payable by a solicitor on taking out a certificate, draws a distinction between carrying on business in London and carrying on business in the country.]

That is for purposes of revenue and has no bearing on this case. No doubt, a man carries on business at the place where he has his office, but his business is not necessarily confined to that locality, and if he has a place of business just outside the prescribed area and supplies customers within the area he carries on business within the prescribed area; otherwise the covenant would be useless for the purpose for which it is intended, namely, the protection of the covenantee in his business or profession: *Turner* v. *Evans* (2); *Brampton* v. *Beddoes*. (3) In the case of a solicitor or any other professional man who can send the product of his brains by letter he carries on business at the place to which the letter is addressed. The object of the covenant was to preclude the covenantor from using to the prejudice of the covenantee the knowledge acquired in the covenantee's employment.

COZENS-HARDY M.R. This is an appeal from an order made by Eve J. on an interlocutory application restraining the defendant, who is a solicitor, and who had served as a clerk to the plaintiffs, from practising contrary, as is alleged, to the terms of

(1) [1905] 2 Ch. 320. (2) 2 D. M. & G. 740; 2 E. & B. 512.
(3) 13 C. B. (N.S.) 538.

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Cozens-Hardy M.R.

the agreement of service. Various points have been raised, or at least are capable of being raised, in this case, but, in my judgment, it is sufficient to dispose of this case on one ground. The defendant admittedly signed a letter in the shape of a stamped agreement on April 16, 1902. [His Lordship read the letter.] The injunction goes on the footing that there has been a breach of that agreement. What has happened? The defendant received salary in lieu of notice in 1909. He then did that which he was perfectly entitled to do, openly took an office somewhere in the Strand, where in his own name he holds himself forth as a solicitor able to practise and entitled to practise. That of course is well outside the radius of five miles from Brentford. What has it been proved that he has done? I take the statement of Eve J. upon what after all is the only important case relied upon as constituting a breach, namely, that of Evans. [His Lordship read a passage from the judgment of the learned judge commencing with the words "In the course of his business" and ending with the words "committed a breach of the agreement."] The facts are clearly stated by Eve J., but, with great respect, I am entirely unable to follow the consequence which he deduces from those facts. I ask myself, what is the meaning of a covenant by a solicitor that he will not within a given radius carry on the profession of a solicitor? It is important here to remember that the law recognizes locality in the practice of a solicitor. Under the Stamp Act, which applies to all solicitors, the certificate which a solicitor has to obtain depends upon this circumstance, whether he practises or carries on business within ten miles of the Post Office in the city of London or elsewhere in England. Therefore the law recognizes that there is a locality applicable to the carrying on of the business or profession of a solicitor which may not be applicable to all other professions and all other businesses. But, without relying excessively upon that statute, although I think it is a very relevant statute to refer to, I ask myself, Is it possible to say that a solicitor is carrying on the profession of a solicitor in every part of England, Scotland, and Ireland, or the world, in which he has a client, or where he writes a letter for a client making a demand upon

somebody else residing elsewhere? It does seem to me that that is a proposition so outrageous as not to require much discussion. We have been invited to say that certain acts, which are not proved here, might or might not be carrying on the business or profession of a solicitor within a certain area. I have no intention of being seduced into discussing all those points. Of course it is quite plain that there may be a colourable evasion of the covenant, such as there was found to be in *Turner* v. *Evans* (1), where a person, not a solicitor but an ordinary shopkeeper, just outside the prohibited area, by himself and his agents, within the prohibited area delivered goods to customers solicited within that area by himself or by his agents. The Court held (and I do not wonder at it) that that was, within the fair and natural meaning of such a covenant, carrying on business within the prohibited area. We have nothing like that here. We are really asked to say that a covenant of this kind amounts to this: "I will not do any business for any client living within the prohibited area." All I can say is that if a solicitor wants to impose any such obligation upon a clerk he must use very different words from these; he must express quite clearly and plainly what he means. He must not use language of this general nature and then seek to interpret it in a mode which, as I say, might affect the covenantor in his dealings with any client in any part of England, Ireland, or Scotland. If I had taken a different view of the covenant in this case, I might have felt the greatest possible doubt—I will not say more at present—whether a covenant so interpreted ought not to be regarded as unreasonable and not entitled to the protection of the Court. In my opinion the defendant is carrying on the profession of a solicitor in the Strand, and there is no evidence that he is carrying on the profession of a solicitor within the five miles area. I am dealing only with the facts as now proved; I say nothing as to what may be proved when the action comes on for trial, but I am clearly of opinion that the injunction granted by the learned judge cannot be sustained and that the order must be discharged. The appeal will be allowed, the costs both here and below to be the defendant's in any event.

(1) 2 D. M. & G. 740; 2 E. & B. 512.

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FLETCHER MOULTON L.J. I am of the same opinion. This appeal relates to an interim order, and, therefore, it is our duty to confine ourselves strictly to that which appears upon the affidavits and the documents verified thereby in order to leave the ultimate question between the parties to be decided on the evidence called at the trial. I ask myself, therefore, is that which is thus brought before us sufficient to justify an interim injunction? It is for the purposes of our judgment necessary and sufficient that there should have been a breach of the undertaking of such a character that the Court may infer the intention further to break it, and, therefore, the first thing to be ascertained is, Has there been any breach of the undertaking at all? The undertaking is in very simple language. It is "not to carry on within a radius of five miles of the town hall, Brentford, aforesaid the profession of a solicitor either in my own name or in the name of any other person or persons and either directly or indirectly." The acts done by the defendant are not in dispute, so that our decision must turn on the construction of the words "carry on the profession of a solicitor." In my opinion this phrase bears prima facie the same meaning that it does in the Act which relates to the certificate which a practising solicitor is required to take out. I do not agree with the criticism of the respondents' counsel that the Act which prescribes the necessity for that certificate and which also prescribes the fee for it is a fiscal Act, and, therefore, we ought to put it on one side in considering the meaning of the phrase. On the contrary, seeing that the Act makes the necessity depend on the locality in which the business of a solicitor is carried on, we must give great weight to its use there in our consideration of what is the normal meaning of the phrase, and, of course, it is obvious that, if the phrase here means what it does in the Act, the suggestion that there has been a breach in the present case is preposterous. It is ridiculous to say that a solicitor who has not taken out a London certificate but has only taken out a country certificate is exceeding his rights if he writes to a debtor of one of his clients who happens to live in London and calls upon him to pay his debt. But even if we put the use of the phrase in the Act on one side, what other interpretation can be put upon it? If I ask myself

what is the meaning of "carrying on the business of a solicitor" in ordinary parlance I am satisfied that it means that which the solicitor does at his place of business, the place where he solicits work and does it. To say that a London solicitor carries on his business, in the ordinary meaning of the phrase, in Brentford because he writes to a man in Brentford and demands the payment of a debt is in my opinion quite out of the question.

The learned judge appears to have taken another test of locality. He says that if you find the defendant doing solicitor's work for which he is paid by persons within the radius, he is carrying on his profession within the radius. Where the learned judge gets that test from I do not know, but I am relieved from considering it because the respondents do not ask us to accept that test. In those circumstances let us consider what it is that is here proved. It is proved that at the request of a client the defendant wrote to a man within the radius demanding payment of a debt. From that a correspondence took place in which the defendant acted entirely for the client who consulted him at his place of business outside the prescribed area, and that correspondence ultimately ended in the purchase of the debt, the defendant acting for both parties in that transaction at their request. I ask myself, where is there any carrying on of his profession within the radius? I am satisfied there is none, and, therefore, I agree with the conclusion at which the Master of the Rolls has arrived.

Buckley L.J. The proposition that the respondents ask the Court to affirm seems to be that a solicitor carries on the profession of a solicitor at every place at which he does as a solicitor any act whatsoever. If that proposition is true, it follows that if a solicitor in London writes to Toronto to demand payment of a debt from a gentleman at Toronto he is at Toronto doing an act and making a demand as a solicitor, and is therefore carrying on business as a solicitor at Toronto. It seems to me that that is extravagant and absurd. It is to a great extent a question of degree whether the act or succession of acts done is such as that it can be said that they amount to carrying on the profession at that place. It does not follow that because he does an act in a place he is carrying on his business there. He does

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an act as a solicitor there I agree, but he does not necessarily carry on his profession there. I asked Mr. Lawrence to give us the best case he could to shew that the defendant was carrying on his profession within the prohibited area. He said his best case was this. There was a man named Bradbury who resided within the prohibited area. Bradbury came to the defendant in the Strand and asked the defendant to act for him, and he did. The act which he did was to write to a man named Evans, who also resided within the prohibited area, calling upon Evans to pay a certain debt due from a deceased debtor whose executor Evans was supposed to be. Evans thereupon entered into negotiations under which he, Evans, bought up the debt. The defendant acted for both Bradbury and Evans in the matter. He prepared the assignment, and it appears that he sent it to Bradbury and that Bradbury executed it, again within the area. From those facts I am quite unable to evolve the conclusion that the defendant was carrying on the profession of a solicitor within the prohibited area. It seems to me that he was a solicitor carrying on his profession in the Strand, and that in the course of the discharge of his duty he wrote to a man within the district in question, and that the client who consulted him came from the district in question; but it does not follow that he was carrying on his business or profession there because the client came from there. Out of those facts I can evolve nothing at all.

Reliance has been placed on a decision of my own in *Edmundson* v. *Render* (1) which, it is said, has some bearing on this case. To my mind it has absolutely no bearing.

In that case the defendant had covenanted not to "do any work or act . . . . usually done by solicitors" within a certain area. He had written letters to persons at addresses within the prohibited area to demand an apology for a slander and to collect a debt with his (the defendant's) charges as a solicitor and other similar letters. The point for decision was whether this amounted to doing those acts within the district. I held that it did. I held that the act was done within the district, because to write a letter to a man who is within the district is just as if you went to see him within the district; and, therefore, the

(1) [1905] 2 Ch. 320.

defendant in that case had within the district demanded payment of a person who was a debtor there. That is an act usually done by a solicitor. The defendant had covenanted that he would not do any act usually done by solicitors within the district, he had done such an act within the district, and, therefore, he was enjoined. I fail to see how that has any bearing on this case. I seem to have used the words "He has acted as a solicitor within the district." I think that my meaning would have been more accurately expressed thus: "He has within the district done an act usually done by a solicitor." The covenant in *Edmundson* v. *Render* (1) was "not to do any work or act . . . . usually done by solicitors"; here it is "not to carry on the profession of a solicitor." The covenants being different, the one case is no authority in the other. I remain of the opinion which I expressed upon the covenant in *Edmundson* v. *Render* (1), and I am of the opinion already expressed as to the covenant in the present case.

Solicitors: *W. H. Dale; W. H. Bellamy.*

(1) [1905] 2 Ch. 320.

H. B. H.

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Jan. 17.

In re HUGHES & CO.

[00447 of 1910.]

Partnership — Limited Partnership — Winding-up — Just and equitable — Limited Partnerships Act, 1907 (7 *Edw.* 7, *c.* 24)—*Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 268, *sub-s.* 1, *cl. vii.*—*Limited Partnerships (Winding-up) Rules*, 1909.

Where a limited partnership was being carried on at a loss, and the general partner, who had made several drawings on account of profits, refused, without any sufficient reason, to sign the annual general account under which drawings in excess of profits would be repayable, and otherwise acted in a way calculated prejudicially to affect the carrying on of the business:—

Held, that the limited partner was entitled to a winding-up order.

Petition to wind up a limited partnership.

The partnership was created by an indenture dated February 15, 1909, and made between the general partner and the limited partner, and on February 22, 1909, the firm was registered under the Limited Partnerships Act, 1907, the general nature of the business being registered as "publishers."

The capital of the firm was 500*l.*, which was contributed by the limited partner, the general partner contributing no capital.

Clause 7 of the partnership deed provided that the partners might from time to time contribute further capital.

Clause 8 provided that "The said capital of 500*l.* contributed by the said limited partner and also any further capital which may be contributed by either of the said partners under the last preceding clause shall be a debt due to the partner contributing the same from the partnership payable on demand and shall bear interest after the rate of 5*l.* per cent. per annum."

Clause 9 provided that subject to clause 8 the profits and losses should be divided and borne in equal shares.

Clause 10 provided that each partner might draw 50*l.* a month on account of profits. If in any year the aggregate drawings of either partner should on the taking of the annual account be found to exceed his share of profits for that year he was forthwith to repay the excess.

Clause 12 provided that a general account up to March 31 in every year should be taken as soon as practicable after that date and signed by both partners, and when signed it should be binding except as to manifest errors pointed out within six months. Immediately the account was signed each partner might draw out his share of profits after accounting for previous drawings.

Clause 15 provided that the general partner should diligently and faithfully employ himself in and about and devote his whole time to the said business and carry on and conduct the same for the greatest advantage of the partnership and render an account to the limited partner whenever reasonably required.

On December 17, 1910, the limited partner presented this petition to wind up the limited partnership under the Companies (Consolidation) Act, 1908, s. 268, sub-s. 1, cl. vii., and the Limited Partnerships (Winding-up) Rules, 1909: Buckley on Companies, 9th ed. p. 850.

The petition contained allegations to the effect stated in the following paragraphs.

The petitioner had from time to time contributed to the firm sums amounting to 2476*l*. No part of this had been repaid, nor had any interest been paid.

The general partner had been in the habit of absenting himself from the business, and had been absent for five weeks prior to the presentation of the petition.

On December 10, 1910, the petitioner obtained from the firm's accountants a general account to March 31, 1910. This account had not yet been signed by the general partner, and no other accounts had been received from him.

The general partner had contributed no capital to the firm, but had drawn out large sums for his own use, and had drawn out the last sum a few days before the petition was presented.

The principal publication of the firm was a certain monthly magazine, and there was danger that by reason of the general partner's absence and conduct it might fail to be published.

The business of the firm was being carried on at a loss.

The general partner was largely indebted to the firm, and there were only a few shillings in the firm's banking account.

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About the end of September, 1910, the general partner urged the petitioner to pay into the bank a sum of money to meet the demands of the firm's printers and certain other expenses. The petitioner accordingly paid 128*l.* to the bank on September 30, 1910. This included the sum of 86*l.* due to the printers. Notwithstanding this payment the general partner did not pay the printers' bill, and the petitioner had to pay the bill by a separate payment before the printers would print the current number for the next month.

The petitioner submitted that for the above reasons the general partner had been guilty of such conduct as was calculated prejudicially to affect the carrying on of the business and had wilfully or persistently committed a breach of the partnership agreement or otherwise so conducted himself in matters relating to the partnership business that it was not reasonably practicable for the petitioner to continue in partnership with him, and in the circumstances it was just and equitable that the firm should be wound up by the Court.

On December 20, 1910, on a summons before the registrar, the official receiver was appointed provisional liquidator under s. 149, sub-s. 2, of the Companies (Consolidation) Act, 1908.

In his affidavit in opposition to the petition the general partner explained that his occasional absences from business were due to illness. He did not admit that the petitioner had contributed as much as 2476*l.* to the firm. He contended that he was entitled to draw 50*l.* a month by way of salary. He had declined to sign the general account because it contained certain errors and did not provide for his salary. The business was only carried on at a loss because the petitioner would not provide money for the postage of the magazine. He had not paid the printers' bill because no provision had been made for his salary.

C. E. Shebbeare, for the petitioner.

The general partner appeared in person.

SWINFEN EADY J. In my opinion the petitioner has made out a clear case for winding up this limited partnership. In accordance with the partnership deed the capital of 500*l.* was

contributed by the limited partner, i.e., the petitioner. The general partner was not required to find any capital. In addition to the 500*l.* the petitioner has found further money from time to time for the firm. The general partner seems to think that he is entitled to a salary of 50*l.* a month. He is entitled to nothing of the sort. He is merely entitled to draw that amount on account of profits. Under the partnership deed the period for repayment of any drawings in excess of profits runs from the time that the general account is signed. The general account has been prepared, but the general partner has refused to sign it on the ground that it contains a few trivial errors and does not provide for his salary. The business is being carried on at a loss, and the petitioner is not bound to provide any more money to carry it on. The general partner has given no satisfactory reply to the petitioner's complaint that he drew out money expressly paid in to meet the printers' bill and applied it to other purposes. The petitioner is clearly entitled to a winding-up order.

Solicitor: *C. T. Courtney Lewis.*

G. R. A.

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In re LONDON AND SOUTH WESTERN CANAL, LIMITED.

[00362 of 1909.]

Company—Directors—Qualification Shares—Shares held in Trust for Promoter—Misfeasance—Damages.

Directors who accept and hold their qualification shares in trust for and at the will of the promoter, to whom they hand blank transfers, are guilty of misfeasance, and the measure of damages is the highest value of the shares during their holding.

Eden v. *Ridsdales Railway Lamp and Lighting Co.*, (1889) 23 Q. B. D. 368, and *Archer's Case*, [1892] 1 Ch. 322, 337, 341, applied.

Misfeasance Summons.

The above company was incorporated on February 20, 1908, with a capital of 100,000*l.* in 1*l.* shares.

Its main object was to enter into a certain agreement to buy the Basingstoke Canal from a certain vendor for 100,000*l.*, payable as to 68,000*l.* in fully-paid shares, as to 20,000*l.* in debentures, and as to 12,000*l.* by taking over a 12,000*l.* mortgage from a mortgagee.

It appeared that the vendor, who was the private secretary and nominee of the promoter of the company and had acted as such nominee in the promotion, had bought the canal in November, 1907, for 500*l.* subject to the 12,000*l.* mortgage.

The company's articles provided (article 23) that shares might be transferred by transfer in the usual common form, and the instrument of transfer should be signed by both the transferor and transferee, and should contain the name, address, and occupation of the transferee, and the transferor should be deemed to remain the holder of the shares until the transferee's name was entered in the register; (article 83) that the first directors should be appointed in writing by a majority of the subscribers of the memorandum; and (article 85) that the qualification of a director should be the holding of at least 100 shares, and it should be his duty to comply with the provisions of the Companies Act, 1900 (63 & 64 Vict. c. 48), s. 3, now s. 73 of the Companies (Consolidation) Act, 1908.

On February 20, 1908, Frampton, Rouse, Webb, Holroyd, and Cothill were appointed first directors under article 83.

On February 26, 1908, the board passed resolutions for sealing the purchase agreement, and for issuing 68,000 fully-paid shares to the vendor in part payment of the purchase-money. The debentures were also issued to the vendor about this date.

On March 2, 1908, the board issued a certificate for 68,000 shares to the vendor.

On March 18, 1908, the board passed five transfers of 100 shares apiece from the vendor to each director, each transfer purporting to have been made in consideration of 100*l.*, and resolved to issue certificates at the next meeting. The certificates were issued in due course. These were the directors' qualification shares.

The five directors were all present on the above dates.

On November 2, 1909, the company was wound up on a creditor's petition.

On June 21, 1910, the liquidator, having ascertained that no consideration had in fact been paid for these qualification shares, issued the above summons claiming 100*l.* from each director for his misfeasance in accepting his qualification shares as gifts from the promoter or his nominee. The summons also sought to render the directors jointly liable, but this claim was not substantiated by the evidence. With regard to the amount of the damage claimed, it was shewn that certain shares had been issued at par after the misfeasance.

As against Frampton the summons was dropped owing to his bankruptcy.

Rouse, who appeared in person, stated that he had received the shares as a reward for past services to the promoter and the mortgagee, but admitted there was no legal consideration.

The other three directors, Webb, Holroyd, and Cothill, severally denied that they had taken their respective qualification shares as a gift from the promoter or his nominee. They had taken them as trustees for the promoter. They held them as such trustees and had no beneficial interest in the shares or their dividends. As soon as the shares were transferred to them, they had executed blank transfers of the same shares, which

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together with the certificates were subsequently handed to the secretary of the company on behalf of the promoter.

Gore-Browne, K.C., and *Fischer Williams*, for the liquidator. Rouse simply received his qualification shares as a gift from the promoter, so there is no answer to the claim against him.

Webb, Holroyd, and Cothill are really in a worse position. They not only received their shares from the promoter, but by accepting them as trustees for him and executing the blank transfers they could be disqualified the moment they ran counter to his wishes. Now the object of requiring a director to hold qualification shares is "to give him a personal interest in the affairs of the company, and to induce him to attend to them in a way very different to what he would do if he had no interest." One of his duties is "to watch the proceedings of the promoter who is acting as agent for the vendor": *Archer's Case.* (1) How could directors holding their qualification shares as trustees for and at the will of the promoter possibly perform this essential duty? It was a clear misfeasance on their part to place themselves in such an equivocal position and they are liable accordingly. The measure of damages is the highest value of the shares during their holding, in this case par.

R. Rowlands, for Webb. A director is only bound to account for what he receives beneficially as director. Webb never had any beneficial interest in his qualification shares. The fact that he held them on trust for the promoter might be a ground for saying he was never qualified, but as between himself and the company he is only bound to account for his beneficial interest.

[SWINFEN EADY J. It is a claim for misfeasance. The measure of damages is the value of the shares. That is what the company lost by your not paying them for the shares.]

It does not follow that they would have been obtained from the company. They could quite well have been purchased from the promoter or his nominee.

R. H. Hodge, for Holroyd. Qualification as a trustee is a good qualification within article 85. Beneficial ownership is not necessary: Palmer's Company Precedents, 10th ed., part 1,

(1) [1892] 1 Ch. 322, 337, 341.

p. 653; *Grundy* v. *Briggs*. (1) There is no reported case in which a director has been made accountable for shares held as trustee. In *Hay's Case* (2) the shares were a gift from the promoter.

In *Archer's Case* (3) the director bought the shares in the first instance, on the terms that the promoter should purchase them from him at par if called on. It was held that the purchase-money subsequently received by the director under this indemnity agreement belonged to the company, and the director was accountable for it. In the present case the director received nothing. The qualification shares never became his. He held them throughout merely as trustee for the promoter.

Henry Johnston, for Cothill. The principle applicable to these cases is that no agent can be allowed to make any profit without the knowledge and consent of his principal: *Parker* v. *McKenna*. (4) In the present case no question of profit or loss arises. The promoter or his nominee received his 68,000 shares, and they still remain his property. Can it possibly make any difference to the company, in whose name they stand? A director holding the shares as trustee qualifies without expense, and can earn directors' fees, but he is not accountable to the company for those fees. Why should he be accountable for the value of some one else's shares merely because they are used to clothe him with a qualification? It is true that directors holding their qualification shares in trust for the promoter could not form an independent board, and their acts, including the sealing of the contract, might be impeached. But that is not the relief asked by this summons, which is misconceived and should be dismissed.

Gore-Browne, *K.C.*, in reply. The directors were not bound to hold their respective qualification shares in their own right, but it was a gross breach of duty to hold them in trust for the promoter.

By this misfeasance the company has lost the money it would have received for the issue of qualification shares, and as other shares were issued at par the damage is 100*l.* in the case of each director.

(1) [1910] 1 Ch. 444.
(2) (1875) L. R. 10 Ch. 593.
(3) [1892] 1 Ch. 322, 337, 341.
(4) (1874) L. R. 10 Ch. 96, 124.

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SWINFEN EADY J. (after stating the facts). In Rouse's case it is clear on the evidence that the qualification shares were an absolute gift from the promoter. In these circumstances there is no answer to the liquidator's application that Rouse is liable for the par value of the shares, other shares having in fact been allotted at par: *Eden* v. *Ridsdales Railway Lamp and Lighting Co.* (1) The directors Webb, Holroyd, and Cothill are in a different position. They deny that they took the shares as a gift from the promoter, or had any beneficial interest in them. They say they took them as trustees for the promoter. The fact that they executed transfers in blank and handed them to the secretary of the company on behalf of the promoter confirms the truth of their story. In my opinion there was a clear misfeasance by each of these three directors. The object of requiring a director to hold qualification shares is pointed out in *Archer's Case*. (2) It is not only improper but it is misfeasance to qualify by taking shares in trust for the promoter and to execute blank transfers for the promoter to fill up at his pleasure. Directors so qualified hold office at the will of the promoter, and as long as they fulfil his wishes. But as soon as they act contrary to the promoter's wishes he can fill up and lodge the transfers and disqualify them.

I have no difficulty in holding that these directors were guilty of misfeasance. Were it not for the peculiar circumstances of their qualification, it would appear inexplicable how six days after the company was registered the directors could have resolved to affix the company's seal to a contract to buy for 88,000*l.* property that had cost the vendor 500*l.* about three months previously. This was really the effect of the contract if the 12,000*l.* mortgage is deducted from the 100,000*l.* purchase price.

Then comes the question what each director ought to pay. If he had not been qualified by the promoter he could have acquired his shares from the company. It appears that some shares were issued at par, and therefore the loss which the company has sustained by each director's misfeasance, and the sum which each director ought to pay, is the par value of 10

(1) 23 Q. B. D. 368. (2) [1892] 1 Ch. 322, 337, 341.

shares. It is only a several liability, as it is not established that the several directors knew the terms on which their co-directors were qualified. Each director is therefore liable for 100*l.*

It may be that if the application had been framed on different lines a far heavier liability might have been established. There will be a declaration that each of the four directors Rouse, Webb, Holroyd, and Cothill is liable to contribute 100*l.* to the company's assets, and an order for payment accordingly. These directors must pay the costs of the application.

Solicitors: *Tarry, Sherlock & King; H. W. Clarkson; Francis & Johnson; Redfern, Hunt & Co.*

G. R. A.

In re LACON'S SETTLEMENT.
LACON *v.* LACON.

[1910 L. 321.]

Settled Land—Capital or Income—Lease by Life Tenant—Repairing Covenants—Breach—Dilapidations—Damages—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 53.

Where a legal life tenant in possession without impeachment of waste recovers damages from a lessee for dilapidations to buildings arising from breaches of repairing covenants in a lease granted by a previous life tenant under the fiduciary powers of the Settled Land Act, 1882, the damages are capital moneys and must be paid to the trustees of the settlement or into Court.[1]

Noble v. *Cass*, (1828) 2 Sim. 343, explained and distinguished.

ORIGINATING SUMMONS.

By his will, dated December 22, 1884, a testator devised his mansion house called Ormesby House and other freehold hereditaments to his sons and their issue in strict settlement, the life tenants being made unimpeachable for waste. He also bequeathed certain furniture and chattels to his trustees upon trust to allow the same to devolve as heirlooms with the settled estates, but so that the same should not vest absolutely in any person thereby made tenant in tail male by purchase unless he attained twenty-one. The testator appointed his

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trustees to be trustees for the purposes of the Settled Land Act, 1882.

The testator died on September 6, 1888.

By a lease dated December 28, 1888, and made between the testator's eldest son, thereinafter called the lessor, of the first part, the trustees of the second part, and a lessee of the third part, the lessor, in exercise of the powers in that behalf given to or vested in him by the Settled Land Act, 1882, as life tenant in possession without impeachment of waste of the mansion house called Ormesby House and other hereditaments settled by the will, and with the consent of the trustees, demised the mansion house and the settled furniture to the lessee for twenty-one years from October 11, 1888, at a rent of 300*l.* The lessee covenanted to keep the mansion house and buildings in repair. He also covenanted to preserve the furniture (reasonable wear and tear thereof excepted).

It was admitted that the lease of the furniture was not authorized by the Settled Land Acts.

The lessor died on August 11, 1899, and the defendant became legal life tenant in possession without impeachment of waste.

At the expiration of the lease on October 11, 1909, the defendant claimed damages against the lessee's representatives for breaches of covenant. The particulars of the claim were as follows:—

1. Dilapidations to buildings	£881
2. Chattels damaged or missing	228
3. Loss of rent during half a year while premises being repaired	150
4. Surveyor's charges	65
	£1324

Item 4 had been paid by the defendant. A sum of 1000*l.* was ultimately paid to the defendant in settlement of this claim.

This summons was issued to determine whether the trustees were entitled to the whole or any part of the 1000*l.* as capital or whether the defendant was entitled to retain it.

J. M. Stone, for the trustees. The 1000*l.* must be apportioned rateably between the four items of the claim, and the apportionments dealt with as follows:—

Item 4. The apportionment must be paid to the defendant and the balance must be paid to him out of items 1, 2, and 3 rateably.

Item 3. The net balance of this item belongs to the defendant.

Item 2. The lessor had no power to lease the furniture and chattels under s. 37 of the Settled Land Act, 1882: Hood and Challis on the Conveyancing and Settled Land Acts, 7th ed. p. 296. The defendant has therefore no claim to the balance of this item, which must be paid to the trustees.

Item 1. This is the only item raising any substantial question for argument. It is for dilapidations to buildings due to non-repair in breach of the lessee's covenants. It is submitted that it belongs to the trustees, not the defendant. The lease was granted under the powers of the Settled Land Act, 1882. Under s. 53 the lessor was in the position of a trustee for all parties entitled. Neither he, therefore, nor his successor the defendant could retain damages recovered for breach of covenants of that lease: *Mitchell* v. *Armstrong.* (1) In the same way, the defendant could not have retained money paid as consideration for accepting a surrender of the lease—*In re Rodes* (2)—though it would be otherwise in the case of a lease not granted under the Act: *In re Hunloke's Settled Estates.* (3) This is the view taken in Hood and Challis on the Conveyancing and Settled Land Acts, 7th ed. p. 243, and in Gover on Capital and Income, 2nd ed. p. 5.

T. T. Methold, for the defendant. The defendant is legal life tenant in possession without impeachment of waste and is prima facie entitled to item 1 as a casual profit: *Noble* v. *Cass* (4); *Earl Cowley* v. *Wellesley.* (5) No doubt "in exercising the leasing power under the Act" the lessor was bound to have regard to the interests of all parties entitled under the settlement and "in relation to the exercise thereof by him" was

(1) (1901) 17 Times L. R. 495.
(2) [1909] 1 Ch. 815.
(3) [1902] 1 Ch. 941.
(4) 2 Sim. 343.
(5) (1866) L. R. 1 Eq. 656.

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to be deemed a trustee for those parties under s. 53. This fiduciary duty he obviously performed, and made a valid and satisfactory lease. But what is there in s. 53 to deprive him or his successor of his right as legal life tenant in possession without impeachment of waste to casual profits under a perfectly proper lease? *In re Rodes* (1) was the case of an equitable life tenant. *Mitchell* v. *Armstrong* (2) appears to have been the case of a legal life tenant. If so, it should not be followed. I cannot press my claim to item 2.

J. M. Stone in reply. In *Noble* v. *Cass* (3) the lease was made by the testatrix, and not under any power. The trustees who had merely an estate pur autre vie for the life of the equitable life tenant recovered on her behalf first in ejectment and subsequently in damages. It was fairly clear that the damages were personal to the life tenant and not to the inheritance. See Co. Litt. 198 a.

Cur. adv. vult.

Jan. 28. SWINFEN EADY J. (after stating the facts). It is not disputed that the sum of 1000*l.* paid in settlement of the claim must be treated as rateably apportioned between the items of claim, and that the defendant, who incurred the costs of the negotiations and surveyor's charges, is entitled to retain the amount apportioned in respect of surveyor's charges, and that the balance of any proper surveyor's charges and the proper costs must be borne rateably by and out of the sums apportioned to the other three items. The balance of the sum apportioned in respect of item 2 belongs to the trustees, and the balance of the sum apportioned in respect of item 3 belongs to the defendant. So far there is no substantial dispute.

But to whom does the balance of the sum apportioned in respect of item 1 belong? The plaintiffs claim it as trustees, the defendant claims it as tenant for life in possession without impeachment of waste. A tenant for life exercising an ordinary leasing power conferred upon him by a will or settlement, and apart from the Settled Land Acts, has not been regarded as a

(1) [1909] 1 Ch. 815. (2) 17 Times L. R. 495.
(3) 2 Sim. 343.

trustee of the power. One of the consequences of the power being considered non-fiduciary is that it has been decided that such a tenant for life may lease to a trustee for himself, so long as the terms of the power are complied with: Sugden on Powers, 8th ed. p. 717; Farwell on Powers, 2nd ed. p. 564; *Wilson* v. *Sewell* (1); *Earl of Cardigan* v. *Montague*. (2) But it is doubtful how far these cases can now be relied upon: see *Boyce* v. *Edbrooke*. (3)

The defendant, in support of his contention that he is entitled to the amount apportioned in respect of item 1, insisted that it was in the nature of a casual profit belonging to the tenant for life, and relied upon the case of *Noble* v. *Cass*. (4) But in that case the trustees, who had brought an action against Brickwood, the assign of the lessee, for breach of covenants and dilapidations and had recovered 500*l*. damages, were only possessed of an estate during the life of Ann Noble, the equitable tenant for life. They declared in that action as assignees, for the life of Ann Noble, of the reversion of the premises expectant upon the lease. The trustees were not trustees of the inheritance, and after the decease of Ann Noble there was a legal remainder to certain other persons as tenants in common in fee simple. It was under these circumstances that Shadwell V.-C. refused to hold that the damages were something accruing to the inheritance, and said that he would be introducing a new equity if he were to hold that damages recovered in an action for a breach of a covenant running with the land were to be considered as part of the inheritance.

Although as a general rule a tenant for life is entitled to make all the profit he can out of all the legal incidents of his life estate without any liability to account, he stands in a different position when he exercises the powers conferred on tenants for life by the Settled Land Acts.

Sect. 53 of the Settled Land Act, 1882, is as follows: "A tenant for life shall, in exercising any power under this Act, have regard to the interests of all parties entitled under the

(1) (1766) 4 Burr. 1975.
(2) (1754) Sugden on Powers, 8th ed. (Appendix), p. 918.
(3) [1903] 1 Ch. 836, 844—847
(4) 2 Sim. 343

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settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties."

The effect of this section is to make the tenant for life a trustee in respect of all powers conferred upon him by the Act, and to make him accountable as such. He is in the position of a trustee, for all parties entitled under the settlement, as regards the exercise of the statutory leasing powers. He could not, therefore, lease to a trustee for himself.

In *Chandler* v. *Bradley* (1) Stirling J. declared a lease granted by a tenant for life to be void on the ground that he had received the sum of 21*l.* for himself as an inducement to execute the lease. The judge held that the case was to be regarded as governed by the ordinary law applicable to dealings with trustees and other persons in a fiduciary position, and on that footing granted the beneficiaries relief, refusing to enter into the question whether or not they had been damnified by what had been done.

Having regard to the fact that the position, duties, and liabilities of a trustee are imposed upon a tenant for life in relation to the exercise of the powers conferred upon him by the Settled Land Act, it was decided by Bigham J. in *Mitchell* v. *Armstrong* (2) that damages recovered by a tenant for life for breaches of the covenant to repair contained in a lease under the Settled Land Act belonged to the tenant for life as trustee for the trust estate and must be paid to the trustees of the settlement.

If a tenant for life granted a lease of a house, and the lessee covenanted to insure against fire and failed to observe the covenant, and the house was destroyed by fire, the lessor might, in an action for damages for breach of covenant, recover the value of the building burnt down and lost, which ought to have been insured: *Ex parte Bateman* (3), relied upon by Erle C.J. in *Betteley* v. *Stainsby* (4); Mayne on Damages, 8th ed., pp. 332, 333. Certainly the tenant for life could not recover and keep for his own benefit the damages arising from the breach of such a covenant. The same principles of equity would be applicable

(1) [1897] 1 Ch. 315, 322.
(2) 17 Times L. R. 495.
(3) (1856) 2 Jur. (N.S.) 265.
(4) (1862) 12 C. B. (N.S.) 477, 499.

as were applied by Kindersley V.-C. in *Pole* v. *Pole* (1), where he held that 3000*l.* paid to a tenant for life to withdraw his opposition to a railway bill must be treated as capital money to be held on the trusts of the settlement. See also *In re Rodes*. (2)

In my opinion, having regard to the true construction and effect of s. 53 of the Settled Land Act, 1882, the sum apportioned in respect of item 1 is payable to the trustees of the settlement, and not to the tenant for life for his own benefit. This is in accordance with the view taken in Hood and Challis on the Conveyancing and Settled Land Acts, 7th ed. p. 243, where it is said that compensation paid for dilapidations in lieu of repairing seems to be capital money, and should be either paid into Court or to the trustees. The same opinion is expressed in Wolstenholme's Conveyancing and Settled Land Acts, 9th ed. pp. 335, 412, and in Gover on Capital and Income, 2nd ed. p. 5. I concur in the view which the text-writers have expressed on this subject.

Solicitors: *Wellington Taylor ; Grover, Humphreys & Son.*

(1) (1865) 2 Dr. & Sm. 420. (2) [1909] 1 Ch. 815.

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Jan. 27, 28; *Feb.* 1.

In re GRESLEY'S SETTLEMENT. WILLOUGHBY *v.* DRUMMOND.

[1910 G. 635]

Will—Class—Collaterals—Death before Testator—Attempt to include Persons who predecease Testator leaving Issue living at Period of Distribution—Wills Act, 1837 (1 *Vict. c.* 26), *s.* 33.

In exercise of a general testamentary power a testatrix appointed trust funds to a class of collaterals who should be living at the period of distribution and by language similar to s. 33 of the Wills Act, 1837, attempted to include in the class persons who should predecease her leaving issue living at the period of distribution:—

Held that, s. 33 being inapplicable to gifts to collaterals, persons who predeceased the testatrix and left issue living at the period of distribution were not effectively included in the class, and, there being no substitutionary gift to their legal personal representatives, their estates were not entitled to share.

ORIGINATING SUMMONS.

By her will, dated July 28, 1881, a testatrix in exercise of a general testamentary power of appointment given by her marriage settlement over certain trust funds (subject to her husband's life interest) appointed part thereof as therein mentioned. The will continued: "And I appoint that all the residue of the said trust funds shall be held in trust for my brother the said Arthur Hislop Drummond and my sisters Frances Emily Cadogan Cox, Lilias Maria Drummond Julia Adams and Catherine Georgiana Drummond, or such of them as shall be living at the decease of the survivor of myself and my said husband the share of each of my said sisters to be for her sole and separate use independent of her husband Provided always that if my said brother and sisters or either of them shall die in my lifetime or in the lifetime of my said husband leaving issue who shall be living at the decease of the survivor of myself and my said husband then the appointment lastly hereinbefore contained shall take effect as if my said brother or sisters respectively had died immediately after the death of the survivor of myself and my said husband."

The testatrix appointed the defendant Arthur Hislop Drummond her executor.

The testatrix died on April 9, 1900, and her husband on November 10, 1909.

The testatrix's sister Frances E. C. Cox died on April 7, 1893, intestate, leaving several children, including the defendant Edmund A. W. Cox. The defendant Arthur H. Drummond was her legal personal representative.

This summons was issued to determine (inter alia) whether upon the true construction of the appointment the estate of Frances E. C. Cox was entitled to share in the appointed funds.

P. F. S. Stokes, for the trustees of the settlement.

Gerard M. Hildyard, for Edmund A. W. Cox. The interest of Arthur H. Drummond as a beneficiary and as legal personal representative of Frances E. C. Cox being conflicting, it falls to me to support the gift. My contention is that in the events that have happened the will is to "take effect" as if Frances E. C. Cox had died immediately after the death of the survivor of the testatrix and her husband. This is equivalent to giving the share to her legal personal representatives as part of her estate.

Sir Denham Warmington, for Arthur H. Drummond and Catherine G. Drummond. Arthur H. Drummond takes no part in the argument, but on behalf of Catherine G. Drummond I contend that there is no substitutionary gift to the legal personal representatives of Frances E. C. Cox. The gift is to her direct. The testatrix has attempted to preserve her share, not by means of a substitutionary gift, but by making a provision similar to s. 33 of the Wills Act, 1837. Now that section does not operate by substitutionary gift, but by a fictitious prolongation of the legatee's life: *Eager* v. *Furnivall* (1); *In re Scott.* (2) But that fiction can only be made effectual by statute, and s. 33 only applies in the case of gifts to issue. In all other cases a direct gift to a legatee who predeceases the testator must fail: *In re Coleman and Jarrom.* (3) The estate of Frances E. C. Cox is therefore not entitled to a share.

Sheldon, W. A. Greene, and *W. H. Draper*, for other parties.

(1) (1881) 17 Ch. D. 115, 118. (2) [1901] 1 K. B. 228, 237, 243.
(3) (1876) 4 Ch. D. 165, 168.

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SWINFEN EADY J. I am of opinion that there is a valid gift to such of the named brother and sisters as were living at the period of distribution or survived the testatrix and died leaving issue living at the period of distribution. The testatrix has attempted to include a brother or sister who died in her lifetime leaving issue living at the period of distribution. That attempt prima facie fails, as it is a gift to a dead person.

The testatrix, however, by the language of her will has attempted to import and apply the provisions of s. 33 of the Wills Act, 1837, to her gift. But those provisions are only applicable and have only a statutory effect in the case of gifts to issue. The testatrix has attempted to import and apply them to a case where they are not applicable and to give a share to a deceased sister without making a substitutionary gift to the deceased sister's legal personal representatives. It is an attempt to give the share direct to her.

The statute is inapplicable, and as there is not any substituted legatee the gift fails—see *Toplis* v. *Baker* (1)—and the estate of Frances E. C. Cox is not entitled to share in the distribution.

Solicitors: *Richard Lionel Grey Willoughby; Lowe & Co.*

(1) (1789) 2 Cox, at p. 121.

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[1910 N. 1362.]

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Contract—Parties—Covenant by Covenantor with himself and others—Joint Right to enforce Obligation—Lease—Assignee—Validity.

Jan. 11, 18.

The testator directed that his trustees should, if requested to do so, give a lease of a freehold house forming part of his estate to his son C. R. at a rent to be fixed by arbitration, and that the lease should contain a lessee's covenant to repair and other covenants usual in a London repairing lease. C. R. was himself one of the trustees; he exercised his option, and a lease was executed between C. R. and his co-trustees as lessors and C. R. as lessee whereby the trustees let the house to C. R. for twenty-one years and he covenanted for himself, his executors, administrators, and assigns, with the lessors, their heirs and assigns, amongst other things, to keep the property in repair and not to assign without the lessors' consent. C. R. entered into possession of and carried on business on the premises till he sold the business to a company and assigned the term to them. They issued debentures secured by a trust deed which included the lease. The lessors brought this action against the trustees of the debenture trust deed for a declaration that the lease was binding on the defendants and that they held the premises subject to the lessee's covenants. The defendants, who had never been in possession, insisted that, by reason of the facts that the covenantor was himself one of the covenantees and that the covenants were joint and not joint and several, they were void and created no obligation by which the defendants were bound:—

Held, that there was no ground for rectification or for holding that the defendants ought to be treated as tenants from year to year; that the lease was not void in law, but the covenants were by one person with himself and others jointly and (following *Ellis* v. *Kerr*, [1910] 1 Ch. 529) were void; and that there was therefore no covenant which could run with the land and impose any personal liability on the defendants.

This was an action brought by lessors of a house for (1.) a declaration that a lease of March 16, 1894, was valid and binding as between them and the defendants, who were assignees of the lease, and that the defendants now held the premises subject to the lessee's covenants contained in the lease; (2.) rectification of the lease; in the alternative (3.) a declaration that the defendants held the premises as tenants from year to year on the terms of the lease; and (4.) an injunction to restrain the defendants from

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parting with the possession of the premises without the previous consent in writing of the plaintiffs. The following statement of facts is taken from the judgment of Warrington J.

The plaintiffs are the present trustees of the will of Andrew Thom Roberts, and, as such, are the successors in title of three persons who by a lease dated March 16, 1894, purported to demise certain hereditaments forming part of the testator's estate to one of themselves. The defendants are assignees of this lease.

The substantial question in the action is whether the defendants are personally bound to perform certain covenants by the lessee expressed to be contained in the lease. The rent has been paid, and no question arises as to this. The defendants do not deny that if the covenants are not performed the plaintiffs may re-enter and determine the lease. They contend only that the so-called covenants are inoperative in law and create no obligation by which they can be personally bound.

Andrew Thom Roberts was at his death seised of No. 5, Hackney Road for an estate in fee simple. By his will, dated July 28, 1892, he appointed his sons Carlton Roberts and Clarence Edgar Roberts and Clement Joslin trustees and executors thereof; and by clause 9 he directed that his "trustees shall grant to my said son Carlton Roberts upon his request or to such person or persons as he shall appoint a lease of the said premises No. 5, Hackney Road or such other premises belonging to me in which at the time of my death the said business may be carried on for any term not exceeding twenty-one years in possession from the time of my death, the rent whereof shall be determined by two arbitrators, one to be appointed by my said son, and the other by my trustees, or in case of disagreement by an umpire to be appointed by the said arbitrators, such lease to contain covenants on the part of the lessee to keep, and, at the end of such term, to deliver up the said premises, in good and substantial repair, and such other covenants and provisions as are usual in a London repairing lease"; and by clause 11 he devised the same premises subject to the lease so to be granted to his trustees in fee in trust for sale. By a codicil dated January 25, 1893, the testator appointed T. B. Napier a trustee

and executor in addition to the three trustees named in his will. The testator died on February 26, 1893, and his will and codicil were proved by Carlton Roberts, Clarence Edgar Roberts, and T. B. Napier, Joslin having renounced probate and disclaimed the trusts. Subsequently Carlton Roberts agreed to accept a lease in accordance with the terms of the will at a rent fixed by a single arbitrator at 437*l.* 10*s.* The rent was no doubt so fixed on the footing that the lease would contain covenants by the lessee to repair.

The lease is dated March 16, 1894. It is made between Carlton Roberts and his two co-trustees, thereinafter referred to as the lessors, of the one part, and Carlton Roberts, thereinafter called the lessee, of the other part. It was thereby witnessed that for and in consideration of the yearly rents, covenants, and agreements thereinafter reserved and contained on the part of the lessee, his executors, administrators, and assigns, to be paid, kept, done, and performed the lessors demised to the lessee, his executors, administrators, and assigns, the premises in question, to hold to the lessee, his executors, administrators, and assigns, for twenty-one years from February 26, 1893, at the rent of 437*l.* 10*s.* And the lessee purported to covenant for himself, his executors, administrators, and assigns, with the lessors, their heirs and assigns, amongst other things, that he would repair the premises, and deliver them up in good repair at the end of the term, and that he would not assign without consent. The lease contained the usual power of re-entry in the event of a breach of any of the covenants. Carlton Roberts entered into possession under the lease and used the premises for the purpose of his business. In 1898 he sold the business to a company named A. T. Roberts, Sons & Co., Limited, and assigned the premises to them for the residue of the term. The company issued debentures which were secured by a trust deed dated July 11, 1898. By this deed the premises were assigned to the trustees for the residue of the term. The trustees were directed to allow the company to remain in possession until the security should become enforceable, and in that event to take possession upon the request of the holders of one-third of the debentures. They were empowered in the same event to appoint

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a receiver. The defendants are the present trustees of the deed. The security having become enforceable, the defendants on June 25, 1910, appointed a receiver. Neither the defendants nor their predecessors, trustees of the deed, have ever personally been in possession, nor have they ever paid any rent. This has been paid first by the company and then by the receiver.

H. Terrell, K.C., and *J. Rolt*, for the plaintiffs. The defendants are not entitled to keep the property without being bound to perform the covenants. We do not dispute that the covenants are void under *Ellis* v. *Kerr* (1), but in equity they are binding on the defendants. They had constructive notice of the provisions of the will and knew that our intention in granting the lease was to carry out the directions of the will, and that that lease must contain these covenants. They do not say that the term is not well granted, or that the covenants are not the stipulations on which it was granted. It was the intention of all the parties that the lessee should be bound by the covenants. The defendants knew this and that the term was granted in pursuance of the will. The lease itself shews that any person who took the term would have to fulfil certain stipulations.

A person who takes an assignment of a lease is estopped from disputing his lessor's title and also from denying the validity of the provisions contained in the document under which he takes the term: *Beale* v. *Sanders*. (2) These covenants should be read as joint and several, in which case the rule in *Ellis* v. *Kerr* (1) would not apply and the covenants would be valid. In that case and the authorities on which it was decided the question arose with respect to covenants to pay sums of money. This is a question on covenants relating to land. "If lessee for years covenants to repair the houses during the term, it shall bind all others as a thing which is appurtenant, and goeth with the land in whose hands soever the term shall come": sixth resolution in *Spencer's Case*. (3) No objection to this action against the assignees can be supported, although it might have been to an action against the lessee himself. The right of action is founded on privity of estate, not on

(1) [1910] 1 Ch. 529.
(2) (1837) 3 Bing. N. C. 850.
(3) (1582) 5 Rep. 16a; 1 Sm. L. C., 11th ed. p. 55.

contract. It is on the same principle as covenants running with the land. The covenant imposes a burden on the land which has to be borne by every person who takes the estate. Thus the assignee may be liable although the lessee is not. The covenant not to assign without consent is a personal covenant, so we could not sue Carlton Roberts after he had parted with the term, but we can sue the defendants: *Wakefield* v. *Brown* (1); Platt on Covenants, pp. 461—465; *Stevenson* v. *Lambard* (2); Chitty on Pleading, 7th ed. vol. i. p. 56. The reasoning of *Ellis* v. *Kerr* (3) does not apply to covenants running with land. There is nothing to prevent a man from imposing a burden on land. If he sells land to a firm in which he is a partner he can make a valid covenant not to build on the rest of his land so as to interfere with the part he has sold, and that covenant will run with the land: *London and South Western Ry. Co.* v. *Gomm* (4); *In re Nisbet and Potts' Contract.* (5) The reasons which prevent a man from becoming a debtor to himself do not prevent him from imposing a burden on land. The defendants are in possession of the property through their cestuis que trust—Lewin on Trusts, 12th ed. p. 1130—and they cannot dispute their liability to pay rent: *Williams* v. *Bosanquet.* (6) The lease is void and they are yearly tenants on the conditions contained in the lease. If the covenants are void and the lease is good the position is the same as if they had been omitted altogether by mistake, and the lease should be rectified by inserting them.

[WARRINGTON J. There has been no mistake of that kind; the lease does carry out the intention of the parties and does contain the covenants.]

Cave, K.C., and *P. F. S. Stokes*, for the defendants. We admit that we had constructive notice of the provisions of the will and that if we do not accept the covenants we must give up possession. There is no ground for holding that the lease should be rectified or that we are tenants from year to year. [They were stopped on these points.] It is said that if we hold the lease we are liable under the covenants by privity of estate; but

(1) (1846) 9 Q. B. 209.
(2) (1802) 2 East, 575.
(3) [1910] 1 Ch. 529.
(4) (1882) 20 Ch. D. 562.
(5) [1906] 1 Ch. 386.
(6) (1819) 1 Brod. & B. 238.

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the question is to what we are liable. The transfer of the lessee's interest to another carries with it the privity of estate previously subsisting between the lessor and lessee: Platt on Leases, vol. ii. p. 400. The authorities are clear that a covenant by one with himself and another is void. There is no such further operation of the covenant as is suggested. No doubt when a lessee gives a covenant which binds him it binds his successors, but if it does not bind him it does not bind his land. An obligation outside the lease does not run with the land. In order to run with the land it must be the lessee's covenant in the strict sense contained in the lease itself: Foà on Landlord and Tenant, 4th ed. p. 421; *Elliott* v. *Johnson.* (1) If these covenants are bad the assignees are not bound by any collateral obligation entered into by their assignor. This lease is also void because it does not comply with the power in the will. We are not estopped from contending that the lease is bad. The authorities shew not merely that the original lessee cannot be sued, but that there is no contract at all on which anybody can be sued: *Boyce* v. *Edbrooke* (2); *Ellis* v. *Kerr.* (3) A covenant cannot be split up and treated as partly personal and partly running with the land. We do not object to a decision that the lease is entirely void.

H. Terrell, K.C., in reply. The defendants have always insisted that the lease was good and that they were entitled under it to hold the property or assign it as they thought fit. That is the reason why we had to bring this action. We agree that there is no tenancy except under the lease. The defendants are assignees of the lease with knowledge that it was made under the will and was subject to certain conditions. They cannot avail themselves of the fact that owing to some informality the conditions are ineffective and claim to hold the property without being bound by the conditions. A lease by A., B., and C. to C. is not bad: Conveyancing Act, 1881, s. 50. We are entitled as reversioners to enforce performance of these covenants: s. 10.

Cur. adv. vult.

(1) (1866) L. R. 2 Q. B. 120, 127. (2) [1903] 1 Ch. 836.
(3) [1910] 1 Ch. 529.

Jan. 18. WARRINGTON J. stated the facts, and continued:— The defendants insist that by reason of the facts that the covenantor is himself one of the covenantees, and that the covenants are joint and not joint and several, they are void and ineffectual, and create no obligation by which they are bound. The plaintiffs, on the other hand, contend that even at law the defendants are bound, and that, if this be not so, they are bound in equity. I may dispose at once of two alternative positions suggested by the plaintiffs. They claim if necessary to have the lease rectified so as to make the covenant joint and several. There is no ground for rectification; so far as appears, the lease in its present form is in accordance with the intention of the parties, its defect arising from a mistake as to its legal effect. Moreover, if it could be rectified as between the lessors and lessee, I can find no ground on which this relief could be granted as against the assignees. Next it is suggested that the defendants may be treated as tenants from year to year on the terms of the lease. The sufficient answer to this suggestion is that such tenancy as the defendants have is under the lease, which is certainly not void in law, though its form gives rise to some question as to the nature of the lessee's interest which I will allude to presently. This fact, that the lease here is not void in law, distinguishes the case from *Beale* v. *Sanders*. (1)

I now come to the real question in the case. First, what is the position at law? The demise itself, namely, by three joint tenants in fee to one of themselves, gives rise to difficult questions as to the nature of the interest taken by the lessee. No statutory provision is applicable. Sect. 21 of 22 & 23 Vict. c. 35 relates to assignments of chattels real by an assignor to himself and another, and does not relate to leases of freeholds. Sect. 50 of the Conveyancing Act, 1881, by virtue of the definition of conveyance applies to a lease of freehold land, but only enables such a lease to be made by one to himself jointly with another, and has no reference to a lease by two or more to one of themselves alone. What is the effect then at common law of such a demise as the present? The lessee is already seised in fee per mie et per tout, and the demise by himself can have no

(1) 3 Bing. N. C. 850.

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effect, for any term granted by himself would merge in the fee. The other two joint tenants could make an effectual demise of their two-thirds, but they would thereby sever the joint tenancy. I think that the effect must be that the joint tenancy is severed during the term, and that the lessee is entitled to the two-thirds of the land by virtue of the lease, remaining seised of his one-third for his original estate in fee. If this is the right view I can see many serious difficulties in the plaintiffs' way, but I prefer to dispose of the case on other grounds, and will, therefore, treat the matter as if there were no question arising on the form of the demise itself.

The question as to the effect in law of a covenant by one with himself and others jointly has recently been discussed before me in *Ellis* v. *Kerr*. (1) After reviewing the authorities I came to the conclusion in that case that such a covenant is void and creates no legal obligation on the covenantor. I see no reason to alter the view I then expressed, nor can I distinguish the present case from *Ellis* v. *Kerr*. (1) I am of opinion, therefore, that at law the covenants in question were void and could not have been enforced against the covenantor.

But it is contended that, though this may be so, the provisions they embody are a burden on the land and bind an assignee by reason of the privity of estate between him and the lessor. It is true that in general a lessee's covenant of the nature of those in question runs with the land. And the assignee can be sued by reason of the privity of estate between the parties. Privity of estate is an essential condition of the liability, but it does not create it. This is only effected by the covenant. If there is no covenant there can be no liability. At law then I think the plaintiffs' case ought to fail. Have they any better right in equity? It may be conceded that the relations between the lessee himself and his co-trustees and the beneficiaries, and the circumstances under which the lease was granted, would render him liable to perform the obligations which the lease purported to impose upon him. The assignees must no doubt be treated as having notice that the lessee was a trustee and that the lease was granted in pursuance of the will. As regards the nature

(1) [1910] 1 Ch. 529.

of the interest they took under the lease it may well be that it would be subject to the same equities as the interest thereunder of the lessee, and, as I have already pointed out, the defendants do not deny that this is so, for they admit that the lease may be determined unless they perform its conditions. But to impose on the assignees a personal liability by reason of notice is a totally different matter. There is no principle, and no authority, by virtue of which it could be imposed in such a case as the present.

In my opinion, therefore, neither at law nor in equity could the performance of the so-called covenants be enforced by action against the defendants, and as the contrary view is that which is really propounded in the form of declaration asked for by the trustees, I simply dismiss the action. As to the costs, the plaintiffs have been wrong throughout. It is true that in a letter before action the defendants took up a stronger position than they actually hold, but they were not given the opportunity of saying whether they would submit to a determination of the lease, and in the pleadings the position assumed by them is correct. I see no reason for depriving them of costs. My judgment, therefore, must be to dismiss the action with costs.

Solicitors: *Smith, Rundell & Dods; Emanuel & Simmonds.*

H. C. R.

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Jan. 14, 15.

In re YORKE.
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[1910 Y. 493]

Settled Estates—Tenant for Life and Remainderman—Proceedings for Protection of Estates—Costs of unsuccessful Litigation—Whether payable out of Capital Moneys—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 36.

Where a tenant for life, without the previous sanction of the Court, institutes legal proceedings for the protection of the settled estate which ultimately prove unsuccessful, and subsequently applies to the Court that the costs of the proceedings may be paid out of the estate, the Court will consider the matter as though it were an application for leave to commence the proceedings at the cost of the estate.

On such an application the costs of unsuccessful litigation will not, as a rule, be allowed out of the estate where it appears that the proceedings were of a speculative nature, even although the tenant for life acted in good faith and under legal advice.

Adjourned Summons.

This was an application to obtain the sanction of the Court to the expenditure by the plaintiff trustees of capital moneys in their hands in repayment to the tenant for life of the costs of certain litigation instituted by him for the protection of the settled estates under these circumstances.

In 1890, under the will of a testator who died in 1857 and in the events which had happened, lands in Yorkshire, known as the Bewerley Hall estates, stood limited to the use of the first defendant, Thomas Yorke, for life, with remainder to his son John Yorke, the second defendant, in tail male.

In 1906 the same estates, by virtue of indentures of disentail and resettlement executed in 1903, stood limited to the use of the first defendant for life, with remainder to the second defendant for life, with remainder to the third defendant in tail male. The third defendant was the infant son of the second defendant and was born in 1904.

The Bewerley Hall estates included property known as Gouthwaite Hall and lead mines near thereto called the Gouthwaite mines. These mines had not been worked for many years owing to the unremunerative price of lead.

In 1895 the Corporation of Bradford under the powers of a

special Act acquired 300 acres of the Gouthwaite Hall estate to carry out an extensive scheme to supply water to the city of Bradford, which included the construction of a large reservoir, called the Gouthwaite reservoir, near to the mines, and in the conveyance to them of the property they covenanted with Thomas Yorke that "in regard to the mines near Gouthwaite Hall now unworked and the outlet to which is in or near the fields Nos. 127 and 136 on the said plan" (namely, the plan on the conveyance) "the corporation their successors or assigns shall before interfering with the present outlet or mining loose thereof provide at their cost a sufficient outlet for the drainage of the same mines or at their own cost drive another heading at a higher level or, if that cannot be done so as to effectually drain the said mines, then will pay the said Thomas Yorke or other the person or persons entitled to the said mines compensation in respect of the same mines, which compensation shall be settled and determined in manner provided by the Lands Clauses Consolidation Act, 1845, for determining questions of compensation in regard to lands taken thereunder."

In 1906 disputes arose between Thomas Yorke and the corporation, and he commenced the action of *Yorke* v. *Corporation of Bradford* [1906 Y. 761] in the Chancery Division, in which he alleged that the corporation had interfered with the outlet of the mines, and he claimed specific performance of the covenant and damages for the breach thereof. The action was tried before Joyce J., who held that there had been an interference with the outlet of the mines and gave judgment in favour of Thomas Yorke, but his decision was reversed by the Court of Appeal with costs. Thomas Yorke then appealed to the House of Lords, but the House of Lords dismissed his appeal with costs. In bringing the action and in appealing to the House of Lords Thomas Yorke acted under the advice of counsel.

The total cost of this litigation amounted to about 6659*l.*, and of this amount 999*l.* 4*s.* 10*d.* were costs paid by Thomas Yorke to the defendant corporation down to and including the hearing in the Court of Appeal, and 449*l.* 10*s.* 5*d.* were costs paid by him to the corporation as respondents to the appeal to the House of Lords. The rest of the 6659*l.* was made up of his own costs,

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including about 1200*l.*, his costs of the appeal to the House of Lords. Thomas Yorke being desirous that this 6659*l.* should be recouped to him out of capital moneys of the estate in the hands of the trustees, they took out a summons to determine the question.

The affidavit of the trustees contained the following passage:—"The importance of the litigation as regarded the Gouthwaite mines to the Bewerley Hall estate lay in the following facts. The Gouthwaite mines were lead mines which had been worked but for upwards of fifty years had been unworked owing to the unremunerative price of lead. There was before the commencement of the action a prospect of working them to advantage and the said Thomas Yorke had received an offer from a would-be lessee. The workings were however to a considerable extent below the level of the top water in the reservoir. The workings whether below or above the top level had so far as could be ascertained according to the information in the possession of the said Thomas Yorke been drained by an outlet or mining loose which was believed to come out into the open somewhere below the top level of the reservoir and discharge its contents into the river Nidd which now flows through the reservoir. The view taken by the plaintiff and his advisers was that it was impossible to work the mines unless they could be drained and that they could only be efficiently and at the same time cheaply drained by such an outlet or loose.

"If such an outlet or loose could not be obtained they could not be worked remuneratively.

"The plaintiff and his advisers considered that the action of the corporation in placing a reservoir above the outlet of the loose constituted an interference with it and that therefore the corporation had broken their covenant."

There was also evidence that it would cost about 8300*l.* to unwater the mines, and that to mine there for lead was, in the present condition of the lead market, a reasonable speculation for any one wanting to speculate in mining matters.

Timins, for the trustees.

Peterson, K.C., and *MacSwinney*, for the first two defendants.

This is an application under s. 36 of the Settled Land Act, 1882. (1) It is not disputed that Thomas Yorke acted bona fide and with a view to protect the estates and was advised that there was a reasonable prospect of success. The Court has ample jurisdiction under the section, and also under its general jurisdiction, to allow payment of these costs out of the estate: *In re Earl De la Warr's Settled Estates* (2); *In re Lord Rivers' Estate*. (3) It may be that the costs of carrying the proceedings to the House of Lords should not be allowed, but these costs amount only to about 1600*l*. The bulk of the costs were incurred in the proceedings up to and including the Court of Appeal, and those at any rate ought to be allowed.

Butcher, K.C., and *D. D. Reid*, for the infant defendant. The costs of this unsuccessful litigation ought not to be paid out of the estate (1.) because no benefit has accrued to the estate, and (2) because there is no evidence that, if it had been successful, the estate would have benefited, because there is no evidence that the mines could have been worked at a profit. Moreover, if they could be worked profitably, the royalties would go largely to the tenant for life. We do not say that in no case can the costs of unsuccessful litigation be paid out of the estate, but we contend that under the circumstances of this case they ought not to be allowed. A tenant for life and a trustee are in the same position with regard to instituting proceedings on behalf of the estate, and the principle laid down by Bowen L.J. in *In re Beddoe* (4) applies. If a tenant for life commences proceedings without the leave of the Court and chooses to run the risk of the litigation being unsuccessful, and afterwards comes to the Court and asks for payment of his costs out of the estate, he ought to satisfy the Court that, if he had applied for leave to

(1) Settled Land Act, 1882, s. 36: "The Court may, if it thinks fit, approve of any action, defence, petition to Parliament, parliamentary opposition, or other proceeding taken or proposed to be taken for protection of settled land, or of any action or proceeding taken or proposed to be taken for recovery of land being or alleged to be subject to a settlement, and may direct that any costs, charges, or expenses incurred or to be incurred in relation thereto, or any part thereof, be paid out of property subject to the settlement."

(2) (1881) 16 Ch. D. 587.

(3) (1874) 16 Ch. D. 588, n.

(4) [1893] 1 Ch. 547, 562.

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bring the action at the cost of the estate, he would have obtained it. On the evidence here it is exceedingly doubtful whether he would have got that leave. The House of Lords held that there had been no interference with the outlet of the mine; moreover, counsel were not unanimous as to appealing to the House of Lords. Those costs certainly ought not to be allowed. As to the other costs, it is submitted that the Court would not have given leave unless satisfied that some benefit was likely to accrue to the estate, but on the evidence here it was purely a matter of speculation.

Peterson, K.C., in reply.

NEVILLE J. In my opinion, I ought not to allow the costs of the proceedings that have been taken in this case to come out of the estate. I must put myself, as well as I can, in the position in which the Court would have been had an application been made to the Court, as it ought to have been made if it was intended to throw the costs of the proceedings on the estate, before commencing the action which has been brought and tried. So far as the question of the litigation upon the covenant is concerned, the Court would have had before it some evidence which might have induced it to sanction an action provided it was satisfied that the subject-matter of the litigation was a right of such a character as could be properly asserted at the cost of the estate; but on the evidence in this case I do not think the Court would have been satisfied. There is evidence that there was a speculative chance of these disused mines, which had not been worked for many years, having some value, but it was purely speculative; and, in fact, the Court would have been asked to embark the estate in a speculative action in respect of a matter of speculative value; and I do not think that any Court would have sanctioned the tenant for life bringing such an action at the cost of the estate. Under those circumstances, I think this application must be refused.

Solicitors for all parties: *Ridsdale & Son.*

H. L. F.

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[1910 H. 1339.]

Jan. 16, 17.

Market—Statutory Market—Market Rights — Disturbance — Rival Market—Warehouse—"Own shop or shops"—Local Act—Trustees—Waiver.

The Southwark Borough Market was founded by a local Act of 28 Geo. 2 which enabled the churchwardens, overseers, and certain elected inhabitants to erect and hold the market, and for preventing any encroachments enacted that no person should erect or hold any other market in the Borough of Southwark or sell any provisions usually sold in public markets in any stall in any high street of the said Borough within 1000 yards of the bounds of the said market. An amending Act of 30 Geo. 2 prohibited under a penalty of 40*s.* all persons from selling or offering for sale any "beef . . . . fish, fruit, herbs, oatmeal or other victuals or provision whatsoever in any private house, lane, alley, inn, warehouse, street, stall, common passage or other place within 1000 yards of the market but only in his, her, or their private shop or shops." A new body of trustees was appointed by the London Government Scheme (Southwark Borough Market) Confirmation Act, 1907. The defendant was the lessee of a large building fronting the market on the opposite side of a street. The building consisted of four floors. The ground floor was separated from the street by archways which were open while business was going on and at other times closed by revolving shutters. The second and third floors were used for the storage of fruit and vegetables intended for immediate sale. The building had been described by the defendant himself in his return to the rating authority as a warehouse. In this building the defendant carried on the business of selling fruit and vegetables, partly his own, but very largely consigned to him by other persons for sale. He had previously carried on the same business at stalls in the market, which had become wholly a fruit and vegetable market. The market trustees brought this action to restrain the defendant from carrying on this business on the grounds that he was setting up a rival market, and not selling in his own shop. It was proved that similar businesses to that of the defendant had for many years been carried on in the vicinity of the market without complaint from the predecessors of the plaintiffs:—

Held, that the defendant was not setting up a rival market, and that on the true construction of the Act the words "warehouse" and "shop" were not mutually exclusive, but a building part of which was used as a warehouse for the storage of goods intended for immediate sale might be, and the defendant's building was, his "own shop" within the meaning of the Act; and that the defendant's selling other people's goods on commission did not take the sales out of the exception in the Act. The action was dismissed.

Semble, a body constituted, as the plaintiffs were, by statute has no

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power of waiving or abandoning powers or rights entrusted to it as trustees for the inhabitants.

Goldsmid v. *Great Eastern Ry. Co.*, (1883) 25 Ch. D. 511; (1884) 9 App. Cas. 927, distinguished.

THIS action was brought by the trustees of the Southwark Borough Market in the name of the plaintiff to restrain the defendant from establishing or carrying on any market or selling any goods or commodities within 1000 yards of the Southwark Borough Market without a proper licence from the trustees of the said market, contrary to the provisions of the Borough Market, Southwark, Acts, 1754 to 1892, and of the London Government Scheme (Southwark Borough Market) Confirmation Act, 1907.

The Southwark Market was originally founded by a charter of Edward VI. granting the manor of Southwark to the Corporation of London, and, as incident to the said manor, a right to hold a market on four days in the week. This grant was confirmed, after the fire of London, by an Act of Parliament, 29 Car. 2, c. iv., and the market was held in the High Street until 1754, when, the High Street having become a great centre for coaching traffic, the market had become a nuisance. In that year an Act, 28 Geo. 2, c. ix., was passed abolishing the old market and enacting that no market should for the future be held in the High Street, nor any stall placed there.

In the same year by an Act, 28 Geo. 2, c. xxiii., after reciting that a market was necessary and that the churchwardens, overseers, and inhabitants of the parish of St. Saviour within the said Borough had found a site for the said market, commissioners were appointed to set out the site of the new market, and the churchwardens and overseers of the poor of the said parish together with eleven of the inhabitants chosen by the vestry, or any seven of them, were empowered to purchase the land and enjoy the right of holding the said market for the Borough of Southwark upon the land purchased, and to receive and take the usual and accustomed rents, tolls, and profits thereof in as full and beneficial a manner as the same were at any time enjoyed by the Corporation of London, and the Act contained the following clause which was referred to as s. 4, though not numbered in the original.

4. "And for preventing any encroachments which might hereafter be made on the said market, be it further enacted by the authority aforesaid, that from and after the said ground shall be purchased and used as a market, it shall not be lawful for any person or persons to erect or hold any other market within the said Borough of Southwark, or any part thereof, or to vend or expose to sale any fish, meat, poultry, or other provisions, which are usually sold in publick markets, in any stall in any high street of the said Borough of Southwark, or within the space of 1000 yards from the bounds of the said market, within the county of Surrey, except the present hay market for sale of hay and straw only, without licence under the hands and seals of the said churchwardens, overseers, and inhabitants, or any seven or more of them, first had and obtained."

An amending Act was passed two years afterwards, 30 Geo. 2, c. xxxi., which contained the following clauses, referred to as ss. 9 and 10 :—

9. "And be it further enacted by the authority aforesaid, that from and after the passing of this Act, if any butcher, or other person, shall sell, utter, or set to sale, any manner of flesh, or other raw victuals, upon or within any stall, shop, cellar, or window, of any house within the said Borough, not being the owner or occupier of all the said house, every such person being thereof convicted, upon the oath of one or more witness or witnesses, before any one or more justice or justices of the peace for the county of Surrey, or for the said Borough shall, for every such offence, forfeit and pay the sum of 40*s*., one moiety whereof shall be paid to the informer or informers ; and the other moiety shall be paid and applied to the use of the poor of the parish where the offence shall be committed."

10. "And be it further enacted by the authority aforesaid, that from and after the passing of this Act, if any poulterer, country chapman, lader, kidder, victualler, gardener, fruiterer, fish-seller, or any other person or persons, shall sell, utter, or put to shew or sale, by way of hawking, or as a hawker, or otherwise, any beef, mutton, lamb, veal, pork, poultry, butter, cheese, fish, fruit, herbs, oatmeal, or other victuals or provision whatsoever, in any private house, lane, alley, inn, warehouse, street,

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stall, common passage, or other place or places whatsoever, within 1000 yards of the said market within the county of Surrey, but only in his, her, or their own shop or shops, or in the publick market place in the said recited Act and this Act described, and in market time only" [then followed the same penalty as before.]

Another Act, 10 Geo. 4, c. cxix., s. 37, conferred on the said churchwardens, overseers, and inhabitants the right of suing in the name of any one of them or their clerk for the time being.

Each of the Acts above mentioned contained a provision that it should "be adjudged deemed and taken to be a publick Act and should be judicially taken notice of by all judges."

Several other Acts were passed from time to time for regulating the market, and the London Government Scheme (Southwark Borough Market) Confirmation Act, 1907 (7 Edw. 7, c. xlvi.), established an entirely new body of trustees; but the plaintiffs' claim in this action was founded upon the clauses in the two Acts of George II.

The defendant had from 1885 to the end of 1909 carried on business as a salesman in the market. At the end of 1909 the defendant acquired a lease for twenty-one years of a large building called New Hibernia House, in Winchester Street, Borough Market. Winchester Street bounded the market on one side, and the building was opposite to one side of the market and far within the 1000 yards limit. The building was of four floors, including the ground floor. The ground floor was separated from the street by arches which were open to the street during business hours but closed by revolving shutters at other times and, except a small part partitioned off for an office, was used for the sale of vegetables and fruit. The second and third floors were used as warehouses for the storage of goods chiefly intended for immediate sale, but a certain portion was set apart for ripening bananas. The fourth floor was used wholly for domestic purposes and was occupied by the defendant and his son for some days in every week. The business carried on by the defendant in this building was the sale of vegetables and fruit, partly his own, and partly consigned to him by other owners. It was admitted that this was practically the same business as he had carried on at stalls as a

salesman in the market. The defendant still sold in the market, for the owners, similar goods from the carts or waggons in which they were sent up, and which had obtained a standing place, and for these he paid toll. It was alleged that the defendant also sold vegetables in the street in front of his building, and that he had described his address as Borough Market, but the judge held that these allegations were not proved.

It was admitted that for many years buildings of a similar nature to that of the defendant had been erected in the immediate vicinity of the market and within 1000 yards thereof, in which goods and commodities such as were usually sold in the market were sold, and business carried on in the same way as the defendant carried on his business, without any licence from the market trustees and without their making any objection.

The plaintiffs contended that the defendant was setting up a rival market within s. 4 of 28 Geo. 2, c. xxiii., and selling goods usually sold in the market in a place "not being his own shop" within the prohibited limits. The defendant contended that he was not setting up a rival market, but selling goods in his own shop. He also contended that the trustees were estopped by their laches in allowing similar businesses to be carried on from interfering with his business.

Astbury, K.C., Macmorran, K.C., and *Bischoff*, for the plaintiffs. The plaintiffs are entitled to restrain the defendant from carrying on the business he does on two grounds. (1.) He is in fact setting up a rival market; (2.) his premises are not a shop within the meaning of the Acts. The Courts have never laid down an exhaustive definition of what constitutes a rival market, but the indicia which have been pointed out are taking advantage of the concourse of people brought together by a market, selling other people's goods, and giving the same advantages as the market does: *Fearon* v. *Mitchell* (1); *Penryn Corporation* v. *Best* (2); *McHole* v. *Davies*. (3) In the last case the defendant was convicted because he sold 200 sheep in a large yard near the market, though the yard was within the curtilage of his house and he

(1) (1872) L. R. 7 Q. B. 690, 699.
(2) (1878) 3 Ex. D. 292.
(3) (1875) 1 Q. B. D. 59.

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was selling his own sheep. A mere sale of marketable goods in a shop on market days can only be restrained when an immemorial custom is established, but it is quite possible to set up a rival market in a shop. In *London Corporation* v. *Low* (1) and *Wilcox* v. *Steel* (2) businesses carried on in a manner very like the defendant's were restrained. The question of what is disturbance of a market is one of fact: *Manchester Corporation* v. *Lyons*. (3)

[NEVILLE J. In this case the statutes form a code; it is not a question of what is a disturbance of a market.]

The question is the same in either case, because if the defendant is selling in his own shop he is not setting up a rival market.

Pope v. *Whalley* (4) and *Ashworth* v. *Heyworth* (5) are cases decided on what is a shop, and they shew that the defendant's premises are not a shop. The defendant himself described them in his return for rates as a warehouse, and in the Act a warehouse is contrasted with a shop and sale in a warehouse is specifically forbidden. [They also referred to *Spurling* v. *Bantoft*. (6)]

We cannot say that mere size prevents premises being a shop, but sales by a factor or auctioneer of other people's goods cannot be sales in a shop.

Buckmaster, K.C., *Peterson, K.C.*, and *Sargant*, for the defendant. The defendant Ford has two distinct businesses—(1.) he sells in the market from the vans of persons who send their produce to him, in the positions in the market which have been assigned by the market authorities to the vans; (2.) he sells in his own building, which we say is a shop, goods sent to him as a purchaser, or as a factor. In either case the goods are delivered on the premises and sold there to purchasers who come there to buy; that is the sort of selling which always goes on in a shop. The case must depend simply on the words of the statute. The old market was abolished before the new one was created, so the plaintiffs cannot rely upon custom or ancient charter or on cases which establish what in some cases may be disturbance

(1) (1879) 49 L. J. (Q.B.) 144, 149.
(2) [1904] 1 Ch. 212.
(3) (1882) 22 Ch. D. 287, 306
(4) (1865) 6 B. & S. 303, 311.
(5) (1869) L. R. 4 Q. B. 316.
(6) [1891] 2 Q. B. 384

of a customary market. They must bring the case within the words of the statute properly construed, and as the statute is an ancient grant, modern usage may be looked at for the purpose of construing it: *Duke of Devonshire* v. *Pattinson.* (1) The fact that similar businesses to that of the defendant have been allowed to be carried on all round the market shews that it cannot have been intended to prohibit this sort of trading, which presumably existed when the market was created.

The Acts only forbid setting up a market and selling goods elsewhere than in a shop. There can be no setting up a market except by attracting a concourse of buyers and sellers. There is here no concourse of sellers. The other clauses 9 and 10 of the second Act contemplate the same sort of selling as goes on in the market. The plaintiffs attempt to make out that selling other people's goods is forbidden, but it is quite impossible to get that out of the words. A large picture dealer, such as Agnew, constantly sells other people's pictures, but the place where he sells them is not the less his shop. In *Manchester Corporation* v. *Lyons* (2) the persons complained of were selling wholesale, but it was held that they were selling in a shop. In *McHole* v. *Davies* (3) the sales were in a large yard, and in *Pope* v. *Whalley* (4) in temporary stalls erected in an inn yard, let to different persons by the innkeeper.

It is said selling in a warehouse is forbidden, but that can only mean a warehouse which is not a shop. A shop does not cease to be a shop because some part of it is used, as in this case, as a warehouse for temporarily storing goods intended to be sold at once. The judgments in *Fearon* v. *Mitchell* (5) shew that these restrictions are to be construed so as to interfere as little as possible with private trade.

The plaintiffs' own conduct in permitting similar businesses to be carried on disentitles them to proceed against the defendant. We do not say they are barred by time, but, on the analogy of *Sayers* v. *Collyer* (6) and other cases where persons have been held to have lost their right to enforce restrictive covenants by

(1) (1887) 20 Q. B. D. 263.
(2) 22 Ch. D. 287, 306.
(3) 1 Q. B. D. 59.
(4) 6 B. & S. 303.
(5) L. R. 7 Q. B. 690.
(6) (1884) 28 Ch. D. 103

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acquiescence in breaches of them, the Court will not enforce these restrictions when the plaintiffs' own conduct has made it grossly inequitable to do so. *Goldsmid* v. *Great Eastern Ry. Co.* (1) shews that this principle applies to private Acts of Parliament and they can be waived. It is true that the Acts in this case contain a clause that they are to be deemed public Acts, but that is only for the purpose of evidence; whether an Act is public or private depends upon its subject-matter: *Dawson* v. *Paver.* (2)

Astbury, K.C., in reply. Carrying on a rival market is quite a different thing from disturbing a market: *Manchester Corporation* v. *Lyons* (3); *Elwes* v. *Payne.* (4) *Goldsmid* v. *Great Eastern Ry. Co.* (1) does not help the defendant. There the House of Lords held that the citizens of London acting through their corporation might waive rights created by a private Act in their favour. Here the plaintiffs and their predecessors are trustees; any waiver would be a gross breach of trust.

Neville J. The facts in this case are few and simple, and so far I think there is no substantial difference between the two parties to the action. The defendant, Ford, has recently become the lessee of certain premises on the side of Winchester Street facing the Borough Market in Southwark, and he there carries on a business very similar to the business which he formerly carried on as a stall-holder in the market itself. The premises he occupies are, I think, properly described, as he himself described them to the rating authorities, as consisting of a warehouse and counting-house. In addition to that there are residential rooms at the top of the building, but the three floors below are used for the purposes of storing goods for sale with this exception, that some of the goods, bananas, are stored, not merely for sale, but in order that they may ripen. Subject to that, the premises may be said to be a warehouse where goods are kept for sale and sold. Then I ought to add, because this becomes material upon another part of the

(1) 25 Ch. D. 511; 9 App. Cas. 927.
(2) (1847) 5 Hare, 415, 434.
(3) 22 Ch. D. 287, 306.
(4) (1879) 12 Ch. D. 468, 473.

case, that the market is to a considerable extent surrounded by places of business in which the same, or very similar, businesses are carried on, the trader selling his own goods in all of these cases, and in all, or nearly all, selling also goods of other persons on commission. Mr. Ford, in addition to the use of his premises for sales, undertakes the sale of growers' goods despatched to the market in waggons which stand upon the sites allocated to them in the market from time to time by the market superintendent.

Now the question is whether what Mr. Ford has done is an interference with the rights of the plaintiffs, the trustees of the market: they are a body created by statute and endowed by statute with particular powers and privileges, not on their own behalf, but on behalf of the inhabitants of Southwark, and I think that in this case what has to be ascertained is the extent of the right granted by the Legislature to the trustees. Until we ascertain that, it is impossible to say whether Mr. Ford has interfered with any of those rights.

Now the market is a substitute for an old market which used to be held in the High Street of the Borough, and it having become inconvenient to hold the market there, having regard to the increasing traffic, by a statute passed in the reign of George II. that market was abolished, and by a statute of the same session a fresh market was constituted, and the predecessors of the present plaintiffs were appointed trustees of the market. After the provision of a place for the market, and so forth, the second statute proceeds to enact certain provisions for the purpose of preventing any encroachments on the said market, and it is enacted that from and after the said ground shall have been "purchased and used as a market, it shall not be lawful for any person or persons to erect or hold any other market within the said Borough of Southwark, or any part thereof, or to vend or expose to sale any" provisions in any stall, and consequently the question under that statute is whether the defendant has erected or held any other market within the Borough. I do not think I ought to deal with that statute without first turning to the subsequent statute which dealt further with the matter, and, I think, was intended to give further protection, by way of

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penalty, to the trustees of the market. Now the first protection which seems to me to be an extension of what was contained in the former Act is in s. 9, and it is to this effect: "And be it further enacted . . . . that from and after the passing of this Act, if any butcher, or other person, shall sell, utter, or set to sale, any manner of flesh, or other raw victuals, upon or within any stall, shop, cellar, or window, of any house within the said Borough, not being the owner or occupier of all the said house," and then there is a penalty imposed upon infringement of that provision. Then follows the section which has given me most difficulty. [His Lordship read s. 10 above set out, and continued.]

It appears to me that the provisions referred to in s. 9 and s. 10 are indicative of the view that the things there prohibited and penalized would not be per se the erection or holding of another market within the Borough, and I think they must be treated as additional limitations to the trading rights of the inhabitants outside the market. Sect. 9 clearly does not apply because the present defendant is the occupier of the whole of the premises. The question is, how does the matter stand under s. 10? I think undoubtedly the premises which the defendant occupies are properly described as a warehouse, and if the meaning of that section is that no sale can take place in a warehouse without incurring a penalty, then the defendant must be wrong; but the question really seems to me to depend upon what is meant by the subsequent words "but only in his, her, or their own shop or shops." It may be, having regard to the context in which you find the word "warehouse," that the reference there is to premises not belonging to the seller. I am by no means satisfied that that is not the meaning having regard to the provision of s. 9 which prohibits the sale in a house the whole of which is not in the occupation of the seller; but be that as it may, the question is whether a sale in a warehouse is necessarily not a sale "in his, her, or their own shop or shops," and that involves the consideration of what is meant, having regard to the context in this statute and having regard to the words used in the other statute, by "in their own shop or shops." No doubt there is very considerable difficulty in laying down any rule which will afford a

guide to a decision upon the question of what is a "shop," but it seems to me that a warehouse which is used for the purpose of storing goods for the purpose of sale on the premises may very well be a shop, and I think that the intention was not to preclude a person from selling in a warehouse of which he occupied the whole and which belonged to him, and which he used for the purpose of storing goods which he intended then and there to sell. I think it was not intended, either by the original Act or by this second Act, to prevent a person from carrying on a business in his shop, whether that business was confined to the sale of his own goods, or whether he also undertook to sell the goods of other persons upon commission, and I do not think that the carrying on the defendant's business in that way can properly be called erecting or holding a market other than the market in question.

Of course that conclusion rids me of the necessity of deciding the question whether, supposing that Mr. Ford had been guilty of infringing the privileges bestowed upon the trustees by the statute, the present plaintiffs would be precluded from asserting their rights because of the growth which they must be taken to have allowed without objection of similar businesses all round the market. I confess that it does not seem to me, as at present advised, that the matter is precluded by the decision in *Goldsmid* v. *Great Eastern Ry. Co.* (1), and I will say no more than that I have very great doubt whether a body constituted, as these trustees are constituted, by statute has any power or possibility of getting rid of the rights which are entrusted to it as trustee for the inhabitants of the Borough of Southwark. I think, therefore, in the result the plaintiffs' case fails, and that the action must be dismissed with costs.

Solicitors: *Simpson, Palmer & Winder; C. J. Parker.*

(1) 25 Ch. D. 511; 9 App. Cas. 927.

J R. B.

PARKER J. 1910 Dec. 5, 6, 7, 19.

BOWDEN BROTHERS *v.* AMALGAMATED PICTORIALS, LIMITED.

[1910 B. 1880.]

Copyright—Photographs—Supply for illustrating Magazine—Publication after Agreement terminated — Common Law Rights — Injunction — Fine Arts Copyright Act, 1862 (25 & 26 *Vict. c.* 68), *ss.* 1, 4, 6, 11.

The plaintiffs, the proprietors of photographs, the copyright in some only of which was registered, from time to time supplied the defendants, the proprietors of weekly periodicals, with photographs for reproduction as illustrations in the periodicals at certain charges for each user. The plaintiffs having put an end to their arrangement with the defendants, the latter continued the publication of photographs of the former in which the copyright had been registered, and claimed the right to reproduce photographs of the plaintiffs in respect of which there was no registered copyright:—

Held, that the plaintiffs' action had the effect of revoking all open offers, and that the defendants could not subsequently, without the licence of the plaintiffs, use, whether for the first time or not, photographs already supplied by the plaintiffs; and that the plaintiffs, although they had not registered the copyright in some of the photographs, were entitled to an injunction to restrain the infringement not only of their statutory copyright, but also of their common law rights.

Mansell v. *Valley Printing Co.*, [1908] 2 Ch. 441, applied.

The plaintiffs, who were press-photographers carrying on business in partnership as "The Sport and General Illustrations Company," from time to time before 1907 supplied photographs for reproduction in a weekly periodical then called *The Throne*, and afterwards *The Throne and Country*, at the rate of 10*s.* 6*d.* for each time that a photograph actually appeared as an illustration. In 1907 William Lotinga bought the business of publishing the periodical, and thereafter the plaintiffs supplied photographs for reproduction as before, but at the price of 5*s.* for the first user, and 2*s.* 6*d.* for each subsequent user. In 1909 the price for each subsequent user was raised to 5*s.*

In 1910 Lotinga and the defendants commenced the publication of a weekly periodical called *Lotinga's Weekly*, and in March, 1910, the defendants purchased *The Throne and Country*. On April 6, 1910, the plaintiffs wrote and sent a letter to the

defendants quoting 10*s.* 6*d.* as the price for every publication of a photograph in *Lotinga's Weekly*, and shortly afterwards, verbally and by letter, they withdrew permission for the reproduction of any more of their photographs in *Lotinga's Weekly* or *The Throne and Country*.

The plaintiffs registered their copyright in twenty-nine of the photographs of theirs in the defendants' possession, and these had been reproduced by the defendants in their periodicals after the agreement had been put an end to by the plaintiffs. The defendants also claimed the right to publish and intended to publish about 500 other photographs in their possession of the plaintiffs which had not so far been published and the copyright in which had not been registered. In the present action the plaintiffs claimed an injunction to restrain the defendants from printing, publishing, selling, delivering, or otherwise disposing of certain numbers of the two periodicals containing reproductions of the twenty-nine photographs, and from otherwise infringing the plaintiffs' copyright in those photographs, and from printing, publishing, selling, delivering, or otherwise disposing of any copy or copies of any of the plaintiffs' photographs made from prints delivered in trust and confidence by the plaintiffs to the defendants or their predecessors as proprietors of the periodicals otherwise than by selling, delivering, or otherwise disposing of copies of earlier numbers in which some of the photographs had been produced. The plaintiffs also claimed delivery up on oath of the prints of about 500 photographs delivered by the plaintiffs to the defendants or their predecessors, and destruction on oath of all copies of the specified numbers and of all reproductions, prints, blocks, or plates of the twenty-nine photographs, and of all prints of the plaintiffs' photographs other than those of which delivery up was claimed; damages; and penalties.

The defendants pleaded that the supply of the photographs to Lotinga and themselves was in each case a sale of the photographs to him or them, or alternatively conferred on him or them an irrevocable licence to reproduce and publish the selected photographs in their periodicals, and, therefore, that they were entitled to retain the prints, blocks, and plates, and to reproduce

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the photographs in their periodicals, on the terms agreed upon; and they denied that the plaintiffs had any right to withdraw their permission to the defendants to reproduce the photographs.

The action was tried with witnesses before Parker J. on December 5, 6, and 7, 1910.

Romer, K.C., and *Macgillivray*, for the plaintiffs. The reproduction of the photographs in respect of which the copyright had been registered under s. 4 of the Fine Arts Copyright Act, 1862, after the plaintiffs' permission had been withdrawn, gives the plaintiffs a clear right to an injunction and damages: *Tuck & Sons* v. *Priester*. (1) The ground on which penalties were refused in that case—that the copies were made abroad—does not exist in the present case. The same case is an authority for the proposition that, apart from the Act, a breach of contract gives a right to an injunction and damages.

As regards the photographs hitherto unpublished, the plaintiffs have a right of action, although the copyright has not been registered, for at common law an artist has proprietary rights in respect of his unpublished work: *Mansell* v. *Valley Printing Co.* (2)

What the defendants have done is a breach of confidence which gives the plaintiffs a right of action: *Pollard* v. *Photographic Co.* (3) Penalties are recoverable in respect of each copy of the periodicals: *Nicholls* v. *Parker*. (4) The defendants could only justify what they have done and claim to be entitled to do by shewing that they had a written licence.

Martelli, K.C., and *Luxmoore*, for the defendants. Where the owner of the copyright has acquiesced in another person's publication of his work, the Court will not grant an injunction even where there is no written licence: *Cooper* v. *Stephens*. (5) The true effect of the agreement was that the defendants could, but were not bound to, select any of the photographs supplied by the plaintiffs, and that, when once the selection was made, the defendants could go on using it as and when they chose, subject to

(1) (1887) 19 Q. B. D. 629.
(2) [1908] 2 Ch. 441.
(3) (1888) 40 Ch. D. 345.
(4) (1901) 17 Times L. R. 482.
(5) [1895] 1 Ch. 567.

payment of the agreed price. The plaintiffs are bound to perform their part of the agreement, the defendants having fulfilled their own obligations under it, and the defendants can rely on the rule as to part performance although the subject-matter of the contract is photographs only and not land: *McManus* v. *Cooke*. (1)

Cur. adv. vult.

1910. Dec. 19. PARKER J. Prior to the purchase of *The Throne* in 1907 by Mr. Lotinga, the plaintiffs, who are press-photographers, had been supplying photographs to that newspaper without any special arrangement as to terms, being paid 10*s*. 6*d*., which I understand is the ordinary trade price, for each occasion on which one of their photographs was used. After Mr. Lotinga purchased the newspaper he asked the plaintiffs to continue the supply, reducing the charge of 10*s*. 6*d*. for each user to a charge of 5*s*., on the ground that *The Throne* was not a financial success. The plaintiffs consented to make this reduction on the understanding that Mr. Lotinga would give their photographs a preference so long as they were as good as those supplied by other photographers. Subsequently Mr. Lotinga asked for a reduction of the charge to 2*s*. 6*d*. in the case of every user subsequent to the first, and the plaintiffs again consented. I find as a fact that nothing further passed between them as to the terms on which photographs were to be supplied by the plaintiffs, and I reject Mr. Lotinga's evidence in this respect. He was at the time new to the work of editing an illustrated paper, and I have no doubt he has convinced himself that what he may very well have thought would be the result of the arrangement was in fact expressly bargained for and agreed in express terms.

The plaintiffs thereafter continued to supply their photographs to *The Throne*, and the question I have to determine is the precise legal effect of their having done so. Both parties agree that just as the plaintiffs were not bound to supply photographs to Mr. Lotinga, so the latter was not bound to use those supplied. The supply, therefore, amounted to an offer on the plaintiffs'

(1) (1887) 35 Ch. D. 681.

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part to allow the use of any photographs Mr. Lotinga might accept in an issue of *The Throne* newspaper, and, till acceptance as to any one or more of the photographs supplied, the offer could be withdrawn. After acceptance and communication thereof to the plaintiffs there would, I think, be a concluded contract as to each photograph accepted, and Mr. Lotinga would become liable to pay the charge of 5*s.* for each such photograph, and to pay it within a reasonable time. Possibly, after the arrangement as to the charge of 2*s.* 6*d.* only for users subsequent to the first, the supply of photographs may have involved an offer to allow subsequent users for the specified charge, but it seems to me that, as in the case of the first user, so in the case of each subsequent user, the offer could be withdrawn before acceptance and communication thereof. I come to these conclusions apart from, though they are in accord with, the evidence which was given as to the custom of the trade, and I find them confirmed by the conduct of the parties. Usually the first intimation the plaintiffs had that a photograph had been accepted was its appearance in *The Throne*. Sometimes they were told of the acceptance before the appearance in *The Throne*, but in such cases the appearance in *The Throne* followed shortly afterwards. Usually the plaintiffs were informed of Mr. Lotinga's intention to re-use a photograph before its re-use, and on several occasions, having made arrangements with other papers, they stopped such re-user. They also at times demanded the return of photographs not yet used, and their demand appears to have been complied with. They also, as from some date in November, 1909, raised the charge for subsequent users to 5*s.*, and this appears to have been acquiesced in by the defendants. Further, when Mr. Lotinga, in March, 1910, caused the defendant company to be incorporated with the object of taking over *The Throne* newspaper, the plaintiffs pointed out that a statement in the company's prospectus that his blocks were of great value was erroneous, inasmuch as their own permission was required for their re-use, and Mr. Lotinga did not dispute but acquiesced in the plaintiffs' contention.

What I have already said with regard to the photographs supplied by the plaintiffs to *The Throne*, or, as it was

subsequently called, *The Throne and Country*, applies mutatis mutandis to those supplied to *Lotinga's Weekly*, a paper which in 1910 was started by the defendants, or by Mr. Lotinga and sold to them. The arrangement as to photographs so supplied is contained in the plaintiffs' letter of April 6, 1910.

On or about April 15, 1910, the plaintiffs terminated their arrangement with both papers, and in my opinion such determination amounted to a withdrawal of all open offers. After such withdrawal neither Mr. Lotinga nor the defendants could in my opinion by any purported acceptance or communication thereof constitute any contract under which they could use or re-use any of the photographs theretofore supplied by the plaintiffs.

Mr. Lotinga and the defendants contended that according to the real contract with the plaintiffs it was open to him or them to select and set aside any photographs supplied by the plaintiffs for future use, if and when occasion might arise, without becoming bound either to use them or to pay the price agreed unless and until they were actually used, and that after such selection the plaintiffs could not withdraw their offer. They further contended that, as to any photographs already used or to be used in future, the defendants have an unlimited right of re-user if and when and for any purpose they choose, provided that for each user they pay the agreed price. In my opinion, both these contentions are erroneous. Mr. Lotinga says that of many photographs so selected he long ago caused blocks to be made for future use. If he did so, it was, in my opinion, an unwise thing to do, unless he had accepted the photographs in question, though this would have involved paying for them within a reasonable time. Payment in all cases appears to have been made after user, and his idea seems to have been that he could select and retain, but need not pay unless and until he actually used a photograph—a somewhat extravagant contention. Acting on those contentions, the defendants, after the termination of the arrangement, used in *Lotinga's Weekly*, and re-used in *The Throne and Country*, the twenty-nine photographs the copyright in which they are charged with having infringed, and in each case they are proved to have sold copies of the newspapers

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containing the photographs in question after the plaintiffs had registered their copyright. Having regard to the case of *Tuck & Sons* v. *Priester* (1), there would appear to be no defence to the action so far as it relates to the infringement of the copyright in those twenty-nine photographs, unless the defendants establish that they had the plaintiffs' licence, and in this defence they have, in my opinion, failed.

The defendants also have in their possession a number of unpublished photographs belonging to the plaintiffs which they threaten and intend to publish. As to these, the plaintiffs retain their common law rights until publication, notwithstanding that they have at the same time a statutory copyright: see *Mansell* v. *Valley Printing Co.* (2) In my opinion, they are under the circumstances entitled to an injunction to protect their common law rights notwithstanding that they have not registered their statutory copyright.

With regard to damages, I think the plaintiffs are entitled to the usual inquiry if they so desire, but I should suggest that the damages be assessed at 10*s.* 6*d.* for each user or re-user complained of. With regard to penalties, I do not propose to award heavy penalties, because, in my opinion, the defendants bona fide believed that they had a right to do what they have done. I think it will meet the justice of the case if I award penalties of 10*s.* 6*d.* in respect of the infringement of each of the twenty-nine photographs in question.

Solicitor for plaintiffs : *George A. Baker.*
Solicitor for defendants : *Cecil Adler.*

(1) 19 Q. B. D. 629. (2) [1908] 2 Ch. 441.

F. E.

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1910

Nov. 4, 5, 9 10, 11, 14, 15, 16, 17; *Dec.* 6;

1911

Jan. 20.

[1910 J. 286.]

Nuisance—Pollution of River—Local Authority—Discharge of Sewage on Land of Riparian Owner—Injury to Reversion—Injunction at Suit of Private Individual—Practice—Costs of Shorthand Note—Joint Note—Costs in the Cause—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 17, 19, 21—*Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *s.* 25—*Rules of the Supreme Court*, 1883, *Order* LXV., *r.* 27, *sub-r.* 9.

A riparian owner on the banks of a natural stream, whether he is or is not the owner of any part of the bed of the stream, is entitled to the flow of the water, past his land, in its natural state of purity, undeteriorated by noxious matter discharged into it by others. Any one so fouling the water infringes a right of property of the riparian owner, who can maintain an action against the infringer without proving actual damage, and obtain an injunction to prevent the continuance of the injury.

Any one who turns fæcal matter, or allows fæcal matter collected by him or under his control to escape, into a river in such a manner or under such conditions that it is carried, whether by current or wind, on to his neighbour's land is, on the principle of *Rylands* v. *Fletcher*, (1868) L. R. 3 H. L. 330, guilty of a trespass.

Where the fæcal matter so causing injury is discharged from a sewer, on the principle of *Rylands* v. *Fletcher* the duty at common law of the owner of the sewer, whether he made it or not, is to prevent the sewage therein from escaping to the injury of others, and mere neglect of this duty gives a good cause of action to any person injured by such neglect.

A private individual is entitled to an injunction to restrain a local authority from allowing sewage to escape from its sewer to his injury, notwithstanding the statutory right of the inhabitants of the authority's district to send their sewage into its sewers.

Where that local authority was, before the Local Government Act, 1894, a board of guardians which had constructed a sewerage system, it was just as responsible as any private person for allowing sewage to escape therefrom to the injury of others, whether the injury consisted in fouling the water of a river in infringement of the rights of riparian owners or in depositing offensive matter on their land, and the liability of the guardians in this respect was by s. 25 of that Act transferred to rural district councils. The liability so transferred to a rural district council is passed on to an urban district council by an order which transfers to it the liabilities of a rural district council on part of the rural district being turned into an urban district.

Although a reversioner cannot maintain actions in the nature of trespass—including those for infringement of natural rights arising out of

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his ownership of land—without alleging and proving injury to his reversion, if what is complained of is of such a permanent nature that the reversion may be injured, the question of injury or no injury is one for the jury, or the tribunal which has to find the facts of the case, and where injury is found the reversioner may obtain an injunction without joining his tenant as a co-plaintiff.

Glossop v. *Heston and Isleworth Local Board*, (1879) 12 Ch. D. 102, observed upon.

Attorney-General v. *Dorking Union*, (1882) 20 Ch. D. 595, distinguished.

At the trial of the action the solicitors on each side agreed to have a joint shorthand note of the evidence taken, and that it should be used if necessary on an appeal. No arrangement was come to as to taking a transcript or making the costs costs in the action. Both sides took transcripts; the learned judge also used them; judgment was given for the plaintiffs with costs; and they now moved for an order that the defendants should pay all the costs of the note and transcript as being costs of the action:—

Held, that an agreement to take a note jointly did not necessarily make the costs costs in the action, and the motion must be refused.

Osmond v. *Mutual Cycle and Manufacturing Supply Co.*, [1899] 2 Q. B. 488, distinguished.

THE plaintiff in this action was the owner of an estate called Penisardre, in Llanrwst, bounded on the west by the river Conway, which flows from south to north. He was also in occupation of a house on the property, but the fields forming the part of the estate which bordered on the river were in the occupation of a tenant from year to year. The plaintiff had occupied the estate for several years before 1909, when he purchased it subject to all easements and rights affecting it. In the bed of the river, for about 200 yards along the plaintiff's river frontage, and running from the southerly end thereof, there was a shoal of stones and gravel which was uncovered at low water. The river, so far as it adjoined the property, was influenced by exceptional tides, but not by ordinary tides.

Llanrwst, at the time of the present action, had from 2000 to 3000 inhabitants, and a system of water drainage through which the sewage of at least 2000 persons was taken in a crude state, without any treatment, into the river opposite the plaintiff's property.

Before the passing of the Public Health Act, 1875, the guardians of the poor of the Llanrwst Union were, under earlier statutes, the sanitary authority for the district, and they

continued to be so under the Act of 1875, by s. 12 of which any property already vested in them as the sanitary authority remained in them as the sanitary authority under the Act of 1875.

In 1874–75 the guardians began to lay down a system of sewerage for the town of Llanrwst, and, pursuant to some arrangement with the then owners of the plaintiff's property, laid along the river bank thereof a sewer (below called "sewer No. 1"), with an outfall into the river, and until 1882 all the sewage from the guardians' sewers went from this outfall into the river.

In 1882 the guardians, pursuant to an arrangement (more particularly referred to below) with the then tenant for life of the plaintiff's property, laid another sewer (below called "sewer No. 2") across the property, with the intention of connecting it with sewer No. 1 at a point considerably above its outfall, but the intention to connect was not carried out, sewer No. 2 being taken straight into the river.

In 1891 sewer No. 1, so far as it was on the plaintiff's property, was discontinued and parts of it were taken up, and a new outfall for its sewage was made by laying a short sewer from the south-west corner of the property straight into the river bed, this sewer traversing for some yards the river bed adjoining the plaintiff's land. From this date all the sewage from the guardians' sewers was discharged into the river from the two outfalls.

His Lordship found (1.) that the sewage so discharged sensibly diminished the purity of the river opposite the plaintiff's land, and rendered it sensibly less fit for watering cattle and other purposes for which a riparian owner would be entitled to use it, and (2.) that at times, by reason chiefly of back washes and undercurrents in the river, fæcal and other sewage matter was deposited on the bed of the river in close proximity to the plaintiff's land, particularly on the shoal above mentioned, and also, but to a less degree, on the plaintiff's banks contiguous to but below the shoal, and that such fæcal or sewage matter, at any rate at low water, constituted a nuisance.

The agreement above referred to was dated October, 1882, and made between Mary Griffith, the then tenant for life of the

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property, and the rural sanitary authority of the Llanrwst Union, and, after reciting that the latter had applied to the former, under the powers vested in them by the Public Health Act, 1875, for the improvement of the sewerage works in Llanrwst, it provided that the authority should have the right and privilege of constructing a main sewer and manholes, and laying down pipes and other things through the land and premises of Penisardre, in a line to the main sewer therein specified; and that the authority should pay the tenants' claim for compensation, if any, and should continue to have the use of the sewer, pipes, and manholes required for the works, for such term as the same might be required, for the purpose of the sanitary authority or the authority for the time being, the authority paying to Mary Griffith, her heirs or assigns, the net yearly rent of 1*s.*, payable on January 1 in every year, the first payment to be made on January 1, 1883, for the easement above described, besides reimbursing certain drainage expenses incurred by her. The agreement also provided that the authority should have power, on reasonable notice, to enter on the land for the purpose of taking up, relaying, or repairing the sewer and works, paying reasonable compensation for any loss, damage, or inconvenience thereby incurred, and also to enter at all reasonable times for the purpose of inspection.

In 1882 and for some time afterwards the plaintiff was a member of the sanitary authority.

In 1897 the part of the district of Llanrwst which contained the sewer was converted into an urban district by an order of the Denbighshire County Council, confirmed by the Local Government Board, and the order transferred to the urban district council, as regarded the transferred part, the property and liabilities vested in and attaching to the rural district council.

The plaintiff had received rent under the agreement of 1882.

In the present action he, by his pleadings, alleged that the user by the defendants of the sewers was a nuisance to him and his property and prejudicially affected its value, and that the deposit of the sewage on the shoal and other parts of the river bed along his frontage constituted a trespass on his property. He also submitted that what the defendants were doing was in

breach of s. 19 of the Public Health Act, 1875; and he claimed a declaration that the defendants were not entitled to use the two sewers, or either of them, in such a way as to convey or cause to pass into the river any sewage or filthy water until the same had been freed from all excrement or other foul or noxious matter affecting or deteriorating the purity and quality of the water in the river; an injunction restraining the continued use of the sewers in manner aforesaid; and, in addition or alternatively to an injunction, damages.

The defendants pleaded, as barring the plaintiff's right to relief, his acceptance of rent, his knowledge and acquiescence as regards the matters complained of, and his delay in bringing the action. They denied that there was any pollution or nuisance, but disclaimed any right to commit a nuisance or a trespass, and submitted that they had no power to prevent the inhabitants of Llanrwst from using the sewers; and that as regarded such part of the property as was affected by the nuisance or trespass, if any, the same being in the occupation of a tenant who was not a plaintiff in the action, the plaintiff could not maintain the action without shewing injury to his reversion. The defendants also pleaded the Public Authorities Protection Act, 1893, and the Statutes of Limitation.

The pleadings also raised the questions whether the river Conway was a tidal river, and whether the plaintiff owned the river bed where the nuisance was alleged to take place.

The action was tried, with witnesses, before Parker J. on November 4, 5, 9, 10, 11, 14, 15, 16, and 17, 1910.

Romer, K.C., and *E. P. Hewitt*, for the plaintiff. The defendants should be restrained by injunction from polluting the river and thus trespassing on our property. They are discharging crude sewage into the river without attempting to do anything to render it harmless, and that is forbidden by s. 3 of the Rivers Pollution Prevention Act, 1876 (39 & 40 Vict. c. 75). By s. 15 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), the local authority have to maintain sewers. By s. 17 sewage must be purified before it is discharged into a stream. By s. 19 they are to keep the sewers properly cleansed, but we do not complain

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of any breach of this section. By s. 21 any inhabitant of the district may connect his drains with the sewers. By s. 23 the local authority may enforce drainage of undrained houses. Sect. 27 gives powers for disposing of sewage in various ways "provided that no nuisance be created in the exercise of any of the powers given by this section." That provision has been broken by the defendants and we are entitled to bring this action against them: *Foster* v. *Warblington Urban Council.* (1) It was held in *Attorney-General* v. *Dorking Union* (2), following *Glossop* v. *Heston and Isleworth Local Board* (3), that proceedings under the Act of 1876 could not be taken against a local authority merely because a sewer vested in them polluted a stream, they themselves not having constructed or interfered with the sewer. This led to the passing of the Rivers Pollution Prevention Act, 1893 (56 & 57 Vict. c. 31), which provides that, where any sewage falls into a stream after passing through a channel vested in a sanitary authority, the sanitary authority shall for the purposes of s. 3 of the Act of 1876 be "deemed to knowingly permit the sewage matter so to fall, flow or be carried." In the present case, however, the defendants cannot avail themselves of that argument, for they have themselves done some of the work we complain of. The doctrine of *Rylands* v. *Fletcher* (4), that if a person brings on to his land anything which may become mischievous if not kept under proper control, though in so doing he may act without personal wilfulness or negligence, he will be liable in damages for any mischief thereby occasioned, applies to such cases as this: *Hobart* v. *Southend-on-Sea Corporation.* (5) It is said that an injunction should not be granted because the inhabitants have statutory or prescriptive rights to send their sewage into the defendants' sewers, and that that is a reason for refusing the injunction: see *Earl of Harrington* v. *Derby Corporation.* (6) But that case was decided on the balance of convenience and on the ground that the corporation were taking all possible steps to remove the nuisance. There cannot be a prescriptive right to pollute a river, for prescription implies a lost grant,

(1) [1906] 1 K. B. 648
(2) 20 Ch. D. 595.
(3) 12 Ch. D. 102.
(4) L. R. 3 H. L. 330.
(5) (1906) 75 L. J. (K.B.) 305.
(6) [1905] 1 Ch. 205.

and there cannot be a grant of a licence to do an illegal act: *Neaverson* v. *Peterborough Rural Council.* (1) A prescriptive or statutory right to turn sewage into the defendants' sewers cannot authorize them to pass it into the river: *Rylands* v. *Fletcher.* (2)

[PARKER J. A prescriptive right to turn sewage into sewers belonging to a corporation cannot be a defence to an action against them for nuisance; they are not thereby absolved from the duty of seeing that it does not become a nuisance. A private owner would certainly be liable in such circumstances.]

Those cases decide that public bodies, if they have done nothing themselves, are not liable, because they only hold the sewers by virtue of statutes. That is on the footing that the local board is authorized by statute to commit a nuisance, and the cases are treated as applications to compel local authorities to perform their statutory duties. *Rylands* v. *Fletcher* (2) is not referred to in any of them. Interference with the rights of third parties is no defence to this action: *Attorney-General* v. *Leeds Corporation.* (3) An injunction should be granted in this case to prevent the completion of the twenty years necessary to establish prescriptive rights, although the operation of it may be suspended: *Taylor* v. *Friern Barnet Local Board.* (4)

Where a nuisance causes a permanent injury to the reversion, it is not necessary to join as plaintiff the tenant in actual occupation of the property: Kerr on Injunctions, 4th ed. p. 121.

Macmorran, K.C., and *T. J. C. Tomlin*, for the defendants. The plaintiff is precluded by his delay in commencing proceedings, and by his acquiescence, from obtaining the relief which he seeks. Any claim based on the assumption that he is the owner of the bed of the river must fail, because the owner is Lord Ancaster. But, apart from these defences, the action on principle cannot be maintained, whether the river is tidal or non-tidal and however s. 17 of the Public Health Act, 1875, is construed. That section has in some cases been considered to be only a proviso: *Glossop* v. *Heston and Isleworth Local Board* (5); *Attorney-General* v. *Dorking Union* (6); *Earl of*

(1) [1902] 1 Ch. 557.
(2) L. R. 3 H. L. 330.
(3) (1870) L. R. 5 Ch. 583.
(4) [1885] W. N. 7.
(5) 12 Ch. D. 102.
(6) 20 Ch. D. 595.

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Harrington v. *Derby Corporation.* (1) In another case it was held to be a mere prohibitive clause: *Durrant* v. *Branksome Urban Council.* (2) An action for neglect of duty, under the Public Health Acts, by a local authority cannot be maintained by a private individual as distinguished from the Attorney-General: *Glossop* v. *Heston and Isleworth Local Board.* (3) Nor can such an action be brought by a private individual against a local authority for permitting sewers to be used by the inhabitants of the district: *Attorney-General* v. *Dorking Union.* (4)

A special form of procedure is provided as regards matters within the Rivers Pollution Prevention Act, 1876.

The statutory right of inhabitants to connect their drains with sewers, subject to the observance of regulations as to the mode of connection, is as complete an answer to a claim for an injunction as is a prescriptive right: *Brown* v. *Dunstable Corporation.* (5)

The only prohibition contained in s. 17 of the Public Health Act, 1875, as regards natural streams already polluted is against making them fouler than they were before: *Attorney-General* v. *Birmingham, Tame, and Rea District Drainage Board.* (6)

The injury complained of is only slight and does not prejudicially affect the plaintiff's reversion, and therefore, whether the complaint be of nuisance or trespass, he cannot maintain his action without joining his tenant as a co-plaintiff: *Mott* v. *Shoolbred* (7); *Jones* v. *Chappell* (8); *Baxter* v. *Taylor.* (9)

The claim of the plaintiff is also barred by the agreement made in 1882. No question of easement is raised, for a sewer cannot be considered a tenement. [On the question when a river is tidal they referred to *Attorney-General* v. *Chambers* (10); *Reece* v. *Miller* (11); *West Riding of Yorkshire Rivers Board* v. *Tadcaster Rural Council.* (12)

(1) [1905] 1 Ch. 205.
(2) [1897] 2 Ch. 291.
(3) 12 Ch. D. 102.
(4) 20 Ch. D. 595.
(5) [1899] 2 Ch. 378.
(6) [1910] 1 Ch. 48.
(7) (1875) L. R. 20 Eq. 22.
(8) (1875) L. R. 20 Eq. 539.
(9) (1832) 4 B. & Ad. 72.
(10) (1854) 4 D. M. & G. 206.
(11) (1882) 8 Q. B. D. 626.
(12) (1907) 97 L. T. 436.

Romer, K.C., in reply. The plaintiff is not bound to wait till he obtains actual possession, for in the meantime prescriptive rights might be obtained against him if the river is tidal and the Rivers Pollution Prevention Act, 1876, does not apply to it. He is only seeking an injunction to restrain a nuisance, and not asking the Court to stop up existing connections with sewers as was done in *Brown* v. *Dunstable Corporation.*(1) The only mercy the defendants can ask for is that they may have an injunction suspended for a time to enable them to put matters right.

Cur. adv. vult.

1910. Dec. 6. PARKER J. The plaintiff in this action is the owner of a property known as Penisardre, situate at Llanrwst, in the county of Denbigh, and bounded on the west by the river Conway, which flows from south to north. The land immediately adjoining the river on the plaintiff's side consists of low-lying fields which are subject to floods in time of high water. These fields are in the possession of a yearly tenant. In the bed of the river, for a distance of about 200 yards along the plaintiff's river frontage, commencing at the southerly end thereof, is a shoal of stones and gravel which is uncovered in times of low water. There appears to be some doubt as to the ownership of the bed of the river, including the shoal. The presumption of course is that the bed of the river which is not tidal belongs usque ad medium filum to the riparian owners on either side; but it is said that the Conway is a tidal river at the point in question, and further that, whether it is tidal or not, the Earl of Ancaster claims to be, and is, the owner of the entirety of the river bed. On the facts as proved before me I find that the river so far as it adjoins the plaintiff's property, though influenced by exceptional tides, is not influenced by ordinary tides, and therefore is not tidal in the proper sense of the word: see *Reece* v. *Miller*(2); *West Riding of Yorkshire Rivers Board* v. *Tadcaster Rural Council.*(3) Further, I do not think that the evidence before me in support of the Earl's claim to the whole bed of

(1) [1899] 2 Ch. 378.
(2) 8 Q. B. D. 626.
(3) 97 L. T. 436.

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the river is sufficient to rebut the usual presumption. It is true that persons holding licences to fish the Earl's water do, as a fact, fish both sides of the river, and that the Earl's agents insist on his licence being obtained to fish on either side, but a several fishery is not necessarily conclusive as to the ownership of the bed of a natural stream; and it appears that the plaintiff, since he bought the Penisardre property, has himself licensed people to fish on his side of the river, and his tenants' cattle are habitually watered in the river, crossing the shoal for the purpose when the river is low. I doubt, however, whether the fact, if it be a fact, that the plaintiff does not own half the bed of the river is really very important for the purposes of this action.

Llanrwst is a town of some 2000 to 3000 inhabitants, and has a good water supply, and a system of water drainage through which the sewage of at least 2000 people is taken in a crude state, without treatment of any sort, into the river Conway opposite the plaintiff's property. The plaintiff complains, first, that this sewage seriously pollutes the water of the river opposite his property, his rights as riparian owner being thus infringed; and, secondly, that fæcal matter from the sewer outfalls is deposited on the river bed, including the shoal I have mentioned, and along his banks in such quantities as to occasion a serious nuisance, and that such deposit is a trespass on his land.

With regard to the first complaint, I am of opinion that a riparian owner on the banks of a natural stream is, whether he is the owner of any part of the river bed or otherwise, entitled to the flow of the stream past his land in its natural state of purity, undeteriorated by noxious matter discharged into it by others. Any one who fouls this water infringes his right of property, and, therefore, he can maintain an action without proving that he has been actually damaged: see *Lyon* v. *Fishmongers' Co.* (1); *North Shore Ry. Co.* v. *Pion* (2); *Crossley & Sons* v. *Lightowler.* (3)

With regard to the second complaint, I am of opinion that any one who turns fæcal matter or allows fæcal matter collected by him or under his control to escape into a river in such manner

(1) (1876) 1 App. Cas. 662. (2) (1889) 14 App. Cas. 612.
(3) (1867) L. R. 2 Ch. 478.

or under such conditions that it is carried, whether by the current or the wind, on to his neighbour's land is guilty of a trespass: see *Fletcher* v. *Rylands* (1); *Foster* v. *Warblington Urban Council*. (2)

There is in the present case a singular conflict of evidence as to whether the purity of the river is or is not sensibly affected by the sewage in question, and as to whether such sewage is or is not, to any considerable extent or at all, deposited in the river bed, including the shoal, or on the plaintiff's banks. The plaintiff's witnesses, for the most part, described what they had seen and experienced. The defendants' witnesses, for the most part, deposed that, though they had been on the spot at all states of the water, they had never seen or experienced anything of the kind described by the plaintiff's witnesses. I see no reason to think that the plaintiff's witnesses were not telling the truth; and I find it impossible to reject their positive evidence on the strength of the negative evidence of the defendants' witnesses. I think the apparent conflict of evidence may be reasonably explained by the varying conditions of the river Conway, which rises and falls with great rapidity, and is subject to sudden spates and floods. Taking the evidence as a whole, I find (1.) that the sewage in question does sensibly diminish the purity of the river opposite the plaintiff's land and render it sensibly less fit for watering cattle and for the other purposes for which a riparian owner would be entitled to use it; and (2.) that at times, by reason chiefly of back washes and undercurrents in the river, fæcal and other sewage matter is deposited on the bed of the river in close proximity to the plaintiff's land, particularly on the shoal I have mentioned, and also, though to a less degree, on the plaintiff's banks contiguous to and below the shoal, and that such fæcal or sewage matter is, at any rate at times of low water, sufficient to constitute a nuisance. It would not, in my opinion, serve any useful purpose to analyse the evidence of the various witnesses in detail. I have carefully considered the shorthand notes and find the facts as stated.

On these findings of fact, I do not think that if the defendants

(1) (1866) L. R. 1 Ex. 265; L. R. 3 H. L. 330.

(2) [1906] 1 K. B. 648.

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were private individuals, and if the plaintiff were in actual occupation of the fields adjoining the river, there could be any defence to this action. But it is said that the plaintiff cannot maintain this action, first, because the fields adjoining the river are in the occupation of a tenant who is not a co-plaintiff, and, secondly, because the defendants are the local sanitary authority, with statutory obligations, and having only a qualified property in the sewers in question.

With regard to the first point, it is reasonably certain that a reversioner cannot maintain actions in the nature of trespass, including, I think, actions for infringement of natural rights arising out of his ownership of land, without alleging and proving injury to the reversion. If the thing complained of is of such a permanent nature that the reversion may be injured, the question of whether the reversion is or is not injured is a question for the jury: *Simpson* v. *Savage*. (1) I take "permanent," in this connection, to mean such as will continue indefinitely unless something is done to remove it. Thus, a building which infringes ancient lights is permanent within the rule, for, though it can be removed before the reversion falls into possession, still it will continue until it be removed. On the other hand, a noisy trade, and the exercise of an alleged right of way, are not in their nature permanent within the rule, for they cease of themselves, unless there be some one to continue them. In my opinion, what is complained of in the present case is of a permanent nature within the rule. The sewage of Llanrwst will continue to be turned into the Conway unless and until something is done to divert it elsewhere. It is not a case only of the present intention of the defendants, but of the necessary consequences of the physical conditions, if nothing is done to alter them. Further, I am satisfied that the plaintiff's reversion is in fact injured and depreciated in value by what is happening at the present time.

The second point is one of greater difficulty. The defendants say that they are within the principle of *Glossop* v. *Heston and Isleworth Local Board* (2) and are not liable at all. Of course I am bound by the decision of the Court of Appeal in that case, though it is, in my opinion, by no means easy to arrive at the

(1) (1856) 1 C. B. (N.S.) 347. (2) 12 Ch. D. 102.

principle on which it was decided. According to the judgment of Vaughan Williams L.J. in *Foster* v. *Warblington Urban Council* (1), the ratio decidendi was that the action was in substance not an action based on a private wrong, but an action for a mandatory injunction to compel the defendant board to carry out their statutory duty to provide a proper system of sewerage, relief which could only be obtained by prerogative writ of mandamus. This would appear, at any rate, to be the ratio decidendi so far as James L.J. was concerned, for, after referring to the transfer of the sewers in question to the local board by virtue of s. 13 of the Public Health Act, 1875, he says (2): "The sewers, qua sewers, are under their control and vested in them, and by that section alone, as it appears to me, they are under the same liabilities, and have the same defence in respect of any alleged liability, as any private owner of a sewer would have. If the sewer, being in the state in which it was transferred to them, would, independently of the Act of Parliament, give to any landowner or any riparian proprietor a right to an injunction to restrain the use of that sewer, or the abuse of that sewer, it appears to me they would be in the same position as any other owner of a sewer would be. But the case here is not based upon any common law nuisance, or any nuisance existing, or any damage existing irrespective of the neglect of the Act, but upon the alleged neglect to comply with the provisions of the Act of Parliament."

I think it clear that the principle of *Fletcher* v. *Rylands* (3) would apply to the owner of a sewer, whether he made the sewer or not: see *Firth* v. *Bowling Iron Co.* (4) His duty at common law would be to see that the sewage in his sewer did not escape to the injury of others, and mere neglect of this duty would give any person injured a good cause of action. James L.J. evidently thought there was no common law nuisance, or at any rate that the action was not a bona fide action to remedy a private wrong. On the other hand, Brett and Cotton L.JJ., while holding that the plaintiff would have had a cause of action for what was being done if the sewers in question had belonged to a

(1) [1906] 1 K. B. 648.
(2) 12 Ch. D. 110.
(3) L. R. 1 Ex. 265; L. R. 3 H. L. 330.
(4) (1878) 3 C. P. D. 254.

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private person, held that the defendants were not liable because they were a statutory body with only a limited property in, and with only limited powers, and therefore limited duties, with respect to, the sewers transferred to them by the Act. They would be liable for nuisance caused by the exercise of any power vested in them, but not liable, except upon prerogative writ of mandamus, for neglect to perform their statutory duty. In other words, supposing the case put by James L.J. of an existing nuisance at the time of the transfer, the plaintiff's remedy had, in their opinion, gone altogether, and, so far as I can see, without compensation. In *Foster* v. *Warblington Urban Council* (1) Stirling L.J. seems to have thought that the ratio decidendi of *Glossop* v. *Heston and Isleworth Local Board* (2) was to be found in the judgments of Brett and Cotton L.JJ., and certainly those Lords Justices constituted the majority of the Court. If the explanation of Vaughan Williams L.J. is to prevail, I am of opinion that *Glossop* v. *Heston and Isleworth Local Board* (2) has no application to the present case. I am satisfied that the plaintiff is bona fide complaining of a private wrong, and that he is not, under colour of such a wrong, merely attempting to compel the defendants to fulfil their statutory duty. If, on the other hand, the explanation of Stirling L.J. is to prevail, it is impossible to say whether the case applies without tracing the history of the sewerage system of Llanrwst.

Prior to the passing of the Public Health Act, 1875, the guardians of the poor of the Llanrwst Union, under earlier statutes, were the sanitary authority for the district now comprising the sewers in question, and they continued to be such sanitary authority under the Public Health Act, 1875; and, by s. 12 of that Act, any property vested in them as the sanitary authority under the earlier statutes remained vested in them as the sanitary authority under the Public Health Act, 1875. We have, therefore, nothing to do with a transfer of sewers under s. 13 of the last-mentioned Act, such as occurred in *Glossop* v. *Heston and Isleworth Local Board.* (2)

In the year 1874-75 (the precise date does not appear in evidence) the guardians commenced to lay down a system of

(1) [1906] 1 K. B. 648. (2) 12 Ch. D. 102.

sewerage for the town of Llanrwst. For this purpose, having come to some arrangement, the precise nature of which is uncertain, with the then owners of the plaintiff's property, they laid along the river bank thereof a sewer, which I will call sewer No. 1, having an outfall into the river at a point considerably lower down the stream than the outfalls at present existing. Until the year 1882 all the sewage which was turned into the sewers of the guardians found its way through this outfall into the river. In the year 1882 the guardians, having entered into an arrangement dated October 12, 1882, with the then tenant for life of the plaintiff's property, laid another sewer, which I will call sewer No. 2, across the plaintiff's property, with the intention of connecting it with sewer No. 1 at a point considerably above its outfall. As a matter of fact, however, sewer No. 2 was either never connected with sewer No. 1 at all, but taken straight into the river, or, if originally connected with sewer No. 1, was shortly afterwards disconnected therefrom and taken straight into the river. There is no evidence that this was done under any further agreement with any person then interested in the plaintiff's property. In the year 1891, No. 1 sewer, so far as it was situate on the plaintiff's property, was discontinued, parts being taken up, and a new outfall, for such sewage as had theretofore passed through it, was made by laying a short sewer from the south-west corner of the plaintiff's land straight into the river bed, such sewer, for some yards at any rate, traversing the river bed adjoining the plaintiff's land and on his side of the river. From this date all the sewage which found its way into the sewers of the guardians was discharged into the river through the new outfall and the outfall of sewer No. 2, and is still so discharged.

It is, in my opinion, reasonably clear that up to this point the guardians, as the sanitary authority, having themselves constructed the whole sewage system, would be responsible in the same way as any private person for the escape of their sewage to the injury of others, whether the injury consisted in fouling the water of the river in infringement of the rights of riparian owners, or in the deposit of offensive matter on their land. Up to this point there is no room, therefore, for the application of

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Glossop v. *Heston and Isleworth Local Board* (1) on any view of that case.

The guardians, however, ceased to be the sanitary authority for the district, under the provisions of the Local Government Act, 1894, being succeeded in that capacity by the rural district council of Llanrwst, to whom, under s. 25 of the Act, were transferred all the powers, duties, and liabilities of the guardians as sanitary authority, and, under s. 67 of the Act, all property held by the guardians by virtue of such powers and duties. The expressions "duties" and "liabilities," as used in s. 25, have, by virtue of another section of the Act, the same meanings as the meanings respectively assigned to them in the Local Government Act, 1888, and, therefore, by s. 100 of the last-mentioned Act the term "duties" includes all responsibilities and obligations, and the term "liabilities" includes any liability to any proceeding for enforcing any duty. In my opinion, the duties and liabilities thus transferred included the duty of the guardians to dispose of their sewage so as not to interfere with private rights, although this may be a common law duty arising out of the principle of *Fletcher* v. *Rylands* (2), and not a statutory duty. In this respect the Local Government Act, 1894, differs from the Public Health Act, 1875, which, in vesting all sewers in their district in a local sanitary authority, says nothing as to the transfer of duties and liabilities. I am of opinion that the rural district council, upon their constitution under the Act of 1894, became liable for proceedings for breach of this duty to the same extent as the guardians would have been liable had they remained the sanitary authority, and that, so far, the case of *Glossop* v. *Heston and Isleworth Local Board* (1) has no application.

In the year 1897, by virtue of an order of the Denbighshire County Council, made under the Local Government Acts, 1888 and 1894, and duly confirmed by the order of the Local Government Board, the district of the rural district council of Llanrwst was divided into two parts, and that part in which the sewerage system in question is situate became an urban district of which the defendants became the sanitary authority as successors of the rural district council. This order contained provisions

(1) 12 Ch. D. 102. (2) L. R. 1 Ex. 265; L. R. 3 H. L. 330.

whereby the property and liabilities vested in or attaching to the rural district council, so far as the same related to the area comprised in the new urban district, passed to and vested in the defendants. In my opinion, the liabilities transferred again included those attaching to the rural district council in respect of the sewerage system in question, including in particular the common law liability, which, on the principle of *Fletcher* v. *Rylands* (1), attached to such last-mentioned council and their predecessors, the guardians of the poor of the Llanrwst Union, in respect of the disposal of the sewage in their sewers. It follows, I think, that the case of *Glossop* v. *Heston and Isleworth Local Board* (2) has no application to the defendant council any more than it had to the rural district council or the guardians.

Further, the defendant council themselves have not, with regard to the sewerage system vested in them, confined themselves, as the local authority had done in *Glossop* v. *Heston and Isleworth Local Board* (2), to leaving things as they found them. They have themselves laid new sewers connected with such sewerage system, and they have relaid and enlarged a very considerable part of the sewers constructed by the guardians, and this alone seems to me to take this case out of *Glossop* v. *Heston and Isleworth Local Board* (2): see *Foster* v. *Warblington Urban Council.* (3)

The case of *Attorney-General* v. *Dorking Union* (4) was also relied upon by the defendants as an answer to the claim for an injunction. It is true they contended that no questions of prescriptive rights arise in the present case, because of the Rivers Pollution Prevention Act, 1876, but the difficulty which would have arisen, had there been prescriptive rights, arises equally because of the statutory right of persons, with houses within a certain distance of any sewer belonging to the sanitary authority, to connect their drains with such sewer. In this connection they also referred to *Earl of Harrington* v. *Derby Corporation.* (5) It appears to me that if the statutory rights in question afford a defence to an action for an injunction restraining a nuisance from sewage, no such

(1) L. R. 1 Ex. 265; L. R. 3 H. L. 330.
(2) 12 Ch. D. 102.
(3) [1906] 1 K. B. 648.
(4) 20 Ch. D. 595.
(5) [1905] 1 Ch. 205.

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injunction can ever be granted against a sanitary authority. Yet there have been numerous cases in which such injunctions have been granted, and some of them at the suit of private persons, and not, as the defendants suggested, of the Attorney-General only.

Further, I am unable on principle to see why, if the existence of some right in third parties which would be interfered with by an injunction is a bar to relief by way of injunction at all, it should be any less a bar because the Attorney-General is the plaintiff who asks for it. But it seems to me that the statutory rights in question are not analogous to the prescriptive rights referred to in *Attorney-General* v. *Dorking Union*. (1) Those prescriptive rights must have been rights to convey sewage into the river by means of sewers belonging to others, rights which had been acquired against the riparian owners. The statutory rights are only rights to turn sewage from private drains into the sewers of the authority, leaving the authority to dispose of it in any manner they choose. If A., the owner of a cess-pit, grant to B., or B. acquires by prescription, a right to turn B.'s sewage into A.'s pit, I cannot myself see how A. can escape liability for letting the sewage out on his neighbour's land merely because of the rights of B. It would be different if B.'s prescription had been to turn his sewage through A.'s pipe on to his neighbour's land. I come to the conclusion that the existence of the statutory rights affords no defence to the claim for an injunction.

Lastly, the defendants endeavoured to defend the action, partly on the ground of the agreement made in 1882, under which the guardians obtained leave to lay sewer No. 2 through the plaintiff's property (the plaintiff having received rent under such agreement), and partly on the plaintiff's knowledge of everything which has been done, and his delay in instituting these proceedings. I cannot construe the agreement of 1882 as a licence to turn crude sewage into the river to the injury of the owners of the Penisardre estate. The guardians had, under s. 16 of the Public Health Act, 1875, statutory authority to lay sewer No. 2 through Penisardre, without any consent on the part of the owners, although of course they would be bound to compensate

(1) 20 Ch. D. 595.

such owners. I look upon the agreement as settling the compensation payable, and not as granting to the guardians any right which they did not already possess. With regard to the plaintiff's delay, it does not appear to me to be material except so far as the defendants can rely on prescription or the Statutes of Limitation. That they cannot rely on prescription is admitted, and I do not think that, in the case of a continuing nuisance or trespass, the Statutes of Limitation have any application except as to the amount of damage which can be recovered.

The plaintiff does not ask for damages if I grant an injunction; and in my opinion an injunction is, under all the circumstances, the appropriate relief, though no doubt the operation of the injunction will have to be suspended for a reasonable time, and its precise terms require some little consideration, more especially as s. 17 of the Public Health Act, 1875, may be read as conferring a power to turn the sewage into the river provided it is freed from excrementitious or other foul or noxious matter such as would deteriorate the quality of the river water. Under the circumstances possibly the best form of order will be an injunction restraining the defendants from causing or permitting the sewage of the town of Llanrwst, or any part thereof, to flow or pass into the river Conway by means of the existing outfalls, No. 1 and No. 2 respectively, or any other outfall, unless or until the same shall have been sufficiently purified by the removal of excrementitious or other foul matter so as not to pollute the water of the river opposite the plaintiff's land, and from allowing any solid or excrementitious matter to escape through any such outfall so as to accumulate in the river bed or on the plaintiff's banks to such an extent or in such manner as to be a nuisance to the plaintiff or his tenants, the occupiers of the Penisardre estate or any part thereof. I think that if the operation of the injunction be suspended for eighteen months it will meet the justice of the case.

F. E.

1911. Jan. 20. The plaintiff now moved for an order that the costs of the shorthand note and the transcript and prints thereof should be costs in the cause and payable by the defendant council.

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The hearing of the action occupied nine days in November, 1910. Judgment was given on December 6 for the plaintiff, and the defendants were ordered to pay the costs. Before the witnesses were called a discussion took place between the solicitors on each side as to taking a shorthand note of the evidence. There was a conflict of evidence as to the result of this discussion, but it was admitted that it was arranged that, instead of both sides taking a note, one joint note should be taken. No arrangement was come to with reference to taking a transcript of the note or making the costs of the note or transcript costs in the cause. Both sides took printed copies daily of the notes of the evidence and they were also used by the learned judge. The plaintiff claimed that all the costs of the note and transcript should be treated as costs in the cause and paid by the defendants.

Romer, K.C., and *E. P. Hewitt*, for the motion. It was agreed in Court that the shorthand note should be taken jointly and used as the record of the trial, and nothing was said about the parties paying for it in equal shares; so the principle of *Osmond* v. *Mutual Cycle and Manufacturing Supply Co.* (1), that, where there is such an agreement, the costs of the note are costs in the action, applies. The burden of proof is on the defendants to shew why that general rule should not apply. *East London Ry. Co.* v. *Conservators of the River Thames* (2) turned on special facts and does not alter the rule.

T. J. C. Tomlin, for the defendants. There is no such general rule as is suggested. The only question is what was the agreement between the parties. Here the evidence is conflicting and the only agreement proved is to take the note jointly. No other agreement can be supported without cross-examination of the witnesses. In the circumstances the parties must pay for the notes in equal shares.

Romer, K.C., in reply.

PARKER J. This is an application for the exercise of my discretion by making an order that the costs of the shorthand

(1) [1899] 2 Q. B. 488.

(2) (1904) 48 Sol. J. 492.

note taken at the trial, which was used by me, should be costs in the action. I am of opinion that I ought not to make that order. The action was one for nuisance by fouling a stream. There was no great technical difficulty involved in it, and nothing was involved as to which I could not in the usual way have made a note sufficiently useful for myself and for the Court of Appeal if there were an appeal. Therefore, if there had been no arrangement at all between the parties, and they had taken a note and then asked that it should be allowed on taxation, I should have felt bound to refuse the application. Here there seems to have been some agreement, the terms of which are doubtful, that a joint note should be taken. As usual, I asked whether an arrangement had been made and was told that it had been made. I also took the trouble to make it clear that the note was to be used as a substitute for my note on any appeal. I find that that practice saves to a considerable degree the time of the Court, because when I have to take an elaborate note it always lengthens the proceedings. When I say that I will use the shorthand note I consider that I am saving the public time. At the same time I do not go into the question whether it is a proper case in which there ought to be a shorthand note. I leave that to the parties. *Osmond* v. *Mutual Cycle and Manufacturing Supply Co.* (1) was a patent case of an unusual description in which Romer J. would in the exercise of his discretion have allowed a shorthand note, and the Court of Appeal took the same view of it and thought that it was such a case. In the present case I do not think, if I had been asked to exercise my discretion in the matter and allow a note, I should have acceded to the application. It appears to me that this case is not within *Osmond* v. *Mutual Cycle and Manufacturing Supply Co.* (1), but, rather, is analogous to the case before Farwell J., *East London Ry. Co.* v. *Conservators of the River Thames.* (2)

Under the circumstances, therefore, I have come to the conclusion that I ought not to assent to this application. Of course where it is proved that there is an agreement that costs such as these should be costs in the cause, they will be treated in that way; but it is not alleged in any of the affidavits in this case

(1) [1899] 2 Q. B. 488. (2) 48 Sol. J. 492.

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that that was agreed to; it is only stated that there was an agreement to take a joint note. That being so, no useful purpose would be served by a cross-examination of the deponents. The motion must be refused.

Solicitors for plaintiff: *Johnson & Stokes, for Chamberlain & Johnson, Llandudno.*

Solicitors for defendants: *Sharpe, Pritchard & Co., for Porter, Amphlett, Jones & Co., Llanrwst.*

H. C. R.

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[1910 W. 297.]

Covenant—Mortgage by Partners of Real Estate—Deaths of Partners—Conveyance of Share of Mortgaged Property by Trustee of one Partner to Trustees of another Partner subject to Mortgage — Covenant by latter "as such trustees, but not so as to create any personal liability on the part of them or either of them" to pay Mortgage Debt and indemnify former—Effect.

P. and H. formerly carried on business in partnership and as such were entitled as part of their partnership property to certain freehold property which was subject to a mortgage created by them to secure 2000*l.* and interest. After the deaths of P. and H. disputes arose between their respective trustees as to P.'s share in the partnership property, and ultimately a compromise was made in pursuance of one of the terms of which a deed was entered into between the plaintiff, the present trustee of P.'s will, and the defendants, the present trustees of H.'s will. By that deed the plaintiff as trustee granted and released unto the defendants P.'s share in the mortgaged premises subject to the mortgage, and the defendants "as such trustees, but not so as to create any personal liability on the part of them or either of them," thereby jointly and severally covenanted with the plaintiff that they or one of them, their or one of their heirs, executors, administrators, or assigns, would pay the principal sum of 2000*l.* then due in respect of the mortgage and all interest thenceforth to become due thereon, and would keep indemnified the plaintiff and his estate and effects and the estate and effects of P. from all claims and demands on account thereof:—

Held, that the effect of the proviso in the covenant, if valid, would be not merely to limit but to destroy the personal liability on the part of the defendants; that inasmuch as there was a covenant to pay and indemnify, the proviso was repugnant to the covenant and had no effect,

and that the defendants were therefore liable under the covenant as if the proviso had not been inserted in it.

Furnivall v. *Coombes*, (1843) 5 Man. & G. 736, followed.

Williams v. *Hathaway*, (1877) 6 Ch. D. 544, distinguished.

ACTION.

This was an action brought by the plaintiff, Henry John Wyatt Watling, against the defendants, Adelaide Lewis, William Henry Cochran, Alfred George Kaye, and William John Harris, (1.) for a declaration that the defendants were, under an indenture dated July 9, 1905, jointly and severally liable to repay to him the sum of 514*l.* 8*s.* 11*d.* paid by him under an indenture of mortgage dated July 16, 1872, together with interest thereon, and to indemnify him from all liability in respect thereof, and (2.) for a joint and several judgment against the defendants for payment of the said sum of 514*l.* 8*s.* 11*d.* together with interest thereon at the rate of 4 per cent. per annum from the day of payment by the plaintiff thereof.

The facts are fully stated in the judgment of Warrington J. and were shortly as follows:—

The plaintiff was the present trustee of the will of Peter Lewis, and the defendants were the present trustees of the will of Humphrey Lewis.

Peter and Humphrey Lewis formerly carried on business in partnership, and as such were entitled as part of their partnership property to certain land and hereditaments at Llanrwst which were subject to a mortgage created by them and dated July 16, 1872, to secure 2000*l.* and interest.

In 1903 an action was brought by the beneficiaries under the will of Peter Lewis with reference to his share in the partnership property. The action was compromised on the terms of the plaintiff accepting in full satisfaction of such share 150 debentures of 100*l.* each in a limited company which had been formed to acquire the partnership business, and the defendants receiving the share of P. Lewis in the mortgaged premises subject to the mortgage.

In order to carry out the terms of the compromise a deed dated July 9, 1905, was executed by which the plaintiff as trustee granted and released unto the defendants Peter's share in the

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mortgaged premises subject to the mortgage, and the defendants "as such trustees, but not so as to create any personal liability on the part of them or either of them," thereby jointly and severally covenanted with the plaintiff that they or one of them, their or one of their heirs, executors, administrators, or assigns, would pay the principal sum of 2000*l.* then due in respect of the mortgage and all interest thenceforth to become due thereon, and would keep indemnified the plaintiff and his estate and effects and the estate and effects of Peter Lewis from all claims and demands on account thereof.

The mortgagees, having sold the mortgaged property for less than the principal and interest secured by the mortgage, made a demand on the plaintiff for the amount of the deficiency, namely, 507*l.* 15*s.* 1*d.* The plaintiff gave notice to the defendants of this demand, and paid the amount claimed together with interest due thereon, amounting altogether to 514*l.* 8*s.* 11*d.* The defendants refused to repay the plaintiff the amount paid by him, and he thereupon brought the present action. The defendants by their defence alleged that they were not personally liable on the covenant and counterclaimed for rectification of the covenant.

Cave, K.C., and *Frederic Thompson*, for the plaintiff. The attempt by the defendants to exclude personal liability from their covenant cannot succeed. Personal liability cannot be excluded, and parol evidence cannot be admitted to shew that personal liability was not intended to be imposed by the covenant: *Kelner* v. *Baxter*. (1)

A proviso which is in terms wholly repugnant to a covenant creating a personal liability is void: *Furnivall* v. *Coombes* (2); but a proviso only limiting the personal liability without destroying it is valid: *Williams* v. *Hathaway*. (3) The proviso in the present case falls within *Furnivall* v. *Coombes* (2), as its effect is to destroy the personal liability of the defendants altogether, and the covenant must be read as if the proviso was not there.

The words "as such trustees" cannot, it is submitted, mean

(1) (1866) L. R. 2 C. P. 174. (2) 5 Man. & G. 736.
(3) 6 Ch. D. 544.

"if and so long as they are trustees and to the extent of the trust property." A person who contracts "as receiver" is personally liable on the contract: *Burt, Boulton & Hayward* v. *Bull.* (1) So too a person who contracts "as executor" renders himself personally liable, and the remedy of the creditor is against the executor personally and not against his testator's estate: *Farhall* v. *Farhall* (2); *Owen* v. *Delamere.* (3)

[WARRINGTON J. referred to *In re Gorton.* (4)]

Then as to the suggested hardship on the defendants of holding them to be personally liable on the covenant, at the date of the execution of the deed containing the covenant they were already liable on the mortgage to the extent of their testator's assets, and what they are now seeking to do is to retain those assets and to leave the plaintiff to pay the shares of both Peter and Humphrey of the deficiency arising on the sale of the mortgaged property.

J. M. Gover, for the defendants. The plaintiff has made out no case on the claim. It is not sufficient for him to say that there is a repugnant condition in the covenant which must be rejected. The question is, what is the meaning of the covenant taken as a whole? If there are any words in the covenant which are repugnant, it is for the Court to say which of them are to be rejected. The Court may have to hold that the whole covenant is void for uncertainty. The Court in dealing with the matter must have regard to what it conceives to have been the intention of the parties. The present case is entirely distinguishable from *Furnivall* v. *Coombes.* (5) That case was an illustration of the rule, only employed as a last resort, that where there are two clauses in an instrument, the second of which is inconsistent with the first, if the instrument is a will, the first will be rejected, and if it is a deed the second: *In re Bywater.* (6) In the case of a deed that rule only applies where there is a clear unequivocal grant or covenant followed by a proviso, reservation, or exception which is absolutely repugnant to the original grant or covenant. The present case falls within

(1) [1895] 1 Q. B. 276.
(2) (1871) L. R. 7 Ch. 123.
(3) (1872) L. R. 15 Eq. 134.
(4) (1889) 40 Ch. D. 536.
(5) 5 Man. & G. 736.
(6) (1881) 18 Ch. D. 17.

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Williams v. *Hathaway*. (1) That was a case in which the second clause was not absolutely repugnant to the first. Here there is not an unequivocal covenant followed by a repugnant proviso; indeed, there are not two separate clauses at all. If the principle of *Furnivall* v. *Coombes* (2) is to be applied in this case it is rather in the defendants' favour, as the qualifying words on which I rely precede the words of actual covenant. There is here only one undivided clause involving some ambiguity or possibly inconsistency, and the Court has therefore to interpret it according to the ordinary rules of construction in order to ascertain, if possible, the real intention of the parties from the words they have used. If the Court cannot do this it must hold the covenant void for uncertainty.

[WARRINGTON J. If you are right in your contention, would it not be more correct to say, not that the covenant is void for uncertainty, but that there is no covenant at all?]

The obvious intention of the parties was that the defendants should be bound only to a certain extent, and if the Court finds it impossible to say what that certain extent is it must hold that the whole covenant is void for uncertainty. The proper mode of construction to be adopted in this case is that laid down by Wilde C.J. in *Walker* v. *Giles* (3): "As the different parts of the deed are inconsistent with each other, the question is, to which part effect ought to be given. There is no doubt, that applying the approved rules of construction to this instrument, effect ought to be given to that part which is calculated to carry into effect the real intention, and that part which would defeat it should be rejected." The Court is, no doubt, at liberty in construing a clause to pick out words in it and to reject them as being inconsistent with the main body of the clause, but in picking out the particular words rejected regard must be had to the intention of the parties. There is here no reason consistent with the apparent intention of the parties for rejecting the words on which the defendants rely and retaining the rest of the clause. *Gwyn* v. *Neath Canal Navigation Co.* (4) illustrates my submission that when there is an internal inconsistency in a

(1) 6 Ch. D. 544.
(2) 5 Man. & G. 736.
(3) (1848) 6 C. B. 662, 702.
(4) (1868) L. R. 3 Ex. 209, 215.

clause the Court should only reject particular words where such words and not the remaining words appear to be contrary to the real intention of the parties.

[WARRINGTON J. That was a case of construction simply.]

One thing, at all events, is clear on the construction of the covenant, namely, that the covenantors were not to be personally liable out of their own pockets. The covenant was a limited covenant, and the real question is whether the extent of the liability is sufficiently defined to prevent the covenant from being void for uncertainty. If the only words limiting the covenant had been "as such trustees," I should, no doubt, have a difficulty, but they have coupled with them the words "but not so as to create any personal liability on the part of them or either of them," the effect of which is, it is submitted, to limit the personal liability of the defendants to the amount of the trust assets for the time being in their hands, as in the case of *Mathew* v. *Blackmore*. (1)

[WARRINGTON J. The defendants may have parted with the trust estate. You are seeking to force upon the plaintiff a contract into which he never entered.]

If the construction of the covenant is as I have submitted, there is no injustice caused by reason of the defendants having in fact no trust estate left, and certainly no injustice to the plaintiff, who has paid the debt in question to the mortgagees out of his trust estate and not out of his own pocket.

Cave, K.C., was not called upon to reply.

WARRINGTON J. This is an action brought by the plaintiff, who is the present trustee of the will of one Peter Lewis, against four persons who are the executors and trustees of the will of one Humphrey Lewis. Peter and Humphrey Lewis were partners and, as such, were entitled to certain freehold hereditaments situate at Llanrwst, subject to a mortgage thereon for 2000*l*. Peter died on June 6, 1884, having by his will appointed as executors and trustees thereof his brother and partner Humphrey, and one David Jones. On February 20, 1895, David Jones died, and Humphrey Lewis thereupon became the sole executor and

(1) (1857) 1 H. & N. 762.

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trustee of the will of Peter Lewis. In May, 1898, Humphrey died, having by his will appointed the four defendants to this action executors and trustees thereof. They, as representatives of the last surviving trustee of Peter's will, appointed Frederick Whalley to be trustee of Peter's will. Subsequently to that appointment, namely, in 1903, an action was brought by beneficiaries under Peter's will, charging certain breaches of trust against Humphrey and his executors. That action was compromised. One of the terms of the compromise was that Whalley should retire, and on December 30, 1904, the present plaintiff was appointed trustee of the will of Peter. On December 31, 1904, the agreement for compromise of the action was signed. It is sufficient to state the general nature of the position. Peter and Humphrey, as I have said, were partners. Humphrey, or his trustees, I am not sure which, had purported to sell the partnership business and property to a limited company, and had allotted to Peter's estate, in respect of his share, debentures in the company amounting to 15,000*l.*, they taking, I presume, the rest of the purchase consideration. The general effect of the compromise was that Peter's share should continue to be represented with certain modifications by the debentures, and that Humphrey's trustees should take for their share of the partnership assets (amongst other property) the Llanwrst property subject to the mortgage for 2000*l.* The terms in which that part of the agreement is expressed are to be found in clause 2: "The estate and interest of Henry John Wyatt Watling as trustee of the will of Peter Lewis in the hereditaments in the second schedule hereto or in such of the hereditaments as form part of the partnership estate shall be conveyed and released to the parties hereto of the third part," who were the present defendants, "as trustees of the will of Humphrey Lewis." In pursuance of that agreement a deed was executed on July 9, 1905; it was made between the plaintiff of the one part and the defendants of the other part. It recited the facts to which I have already referred, and the deed of December 30 appointing Watling a trustee, and that the executors (the defendants) had come to a settlement with the plaintiff whereby the 150 debentures of 100*l.* each were to be accepted in respect of the share of Peter

in the partnership assets, and that it had been agreed that the share of Peter in (inter alia) the mortgaged hereditaments should be conveyed as thereinafter mentioned, and that there was owing in respect of the mortgage the sum of 2000*l.* with interest, and that the 150 debentures had been allotted to the plaintiff; it was then witnessed that in pursuance of the agreement and in consideration of the allotment of the debentures Watling as trustee granted and released the one half share or interest of Peter Lewis of and in (inter alia) the mortgaged hereditaments to hold to the use of the defendants subject to the indenture of mortgage and to the principal sum of 2000*l.* and interest thereby secured. The deed continued: "And the said Adelaide Lewis, William Henry Cochran, Alfred George Kaye, and William John Harris" (the defendants) "as such trustees but not so as to create any personal liability on the part of them or either of them hereby jointly and severally covenant with the said Henry John Wyatt Watling that they the said Adelaide Lewis, William Henry Cochran, Alfred George Kaye and William John Harris or one of them their or one of their heirs executors administrators or assigns will pay" (inter alia) "the said principal sum of 2000*l.* now remaining due in respect of the said indenture of the 16th day of July, 1872, and all interest henceforth to become due thereon and will keep indemnified the said Henry John Wyatt Watling and his estate and effects, and the estate and effects of the said Peter Lewis from all claims and demands on account thereof."

In 1909 the mortgagees sold the property for less than the amount of the mortgage money and made a demand on Watling, as trustee of Peter, for payment of the deficiency, amounting to upwards of 500*l.* Watling gave notice of that claim to the defendants; he then paid it, and he now brings his action against them for repayment of the money he has so paid and for an indemnity.

The defence is that the defendants are not personally liable under the covenant. Can that defence be sustained upon the facts? The first thing to be done is to find out what is meant by the covenant itself. I need not read it again, but I have not the least doubt on the covenant as a matter of construction that

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they have covenanted to pay this money, and to indemnify the plaintiff, but they have at the same time attempted to qualify the obligation which would be imported by that absolute covenant to pay; and the real question is, have they effectually succeeded in qualifying or displacing that obligation? In other words, I read the covenant as a covenant to pay with the addition of a proviso in the words which begin, "as such trustees but not so as to create any personal liability" If that is the true meaning of the covenant, what is the position of the parties under it?

In *Furnivall* v. *Coombes* (1) certain persons had entered into a covenant that they and their successors, churchwardens and overseers of a certain parish, would pay certain moneys to the plaintiff, followed by a proviso which was in effect that "Nothing in these presents contained shall extend, or be deemed, adjudged, construed, or taken to extend, to any personal covenant of, or obligation upon, the said several persons parties thereto, of the third part, or in anywise personally affect them, any or either of them, their, or any or either of their executors, administrators, goods, effects, or estates, in their private capacity, but shall be, and is intended to be, binding and obligatory upon churchwardens and overseers of the poor of the said parish of St. Botolph, and their successors for the time being, as such churchwardens and overseers of the poor, but not further or otherwise." It was held in that case that the proviso in terms excluded any personal liability on the part of the covenantors, that inasmuch as there was a covenant to pay, any such attempt to exclude personal liability was repugnant to the covenant and would have no effect, and that the defendants were therefore liable under the covenant as if the proviso had not been there. On the other hand it was pointed out in *Williams* v. *Hathaway* (2) that there is no objection in law to a proviso limiting the liability of the covenantor provided it really limits it without destroying it; if it really limits the liability either in point of time or by specifying the particular fund out of which alone the payment has to be made, that may be perfectly good. In *Williams* v. *Hathaway* (2) the vicar of a parish and the incumbent of an ecclesiastical district within the

(1) 5 Man. & G. 736. (2) 6 Ch. D. 544.

parish entered into a building contract with a contractor to build a new church, and they covenanted "to the intent (so far as they lawfully could or might) to bind such person or persons as aforesaid"—that is, the persons for the time being applying a certain fund to be raised—"but not so as to bind either of themselves, or his heirs, executors, or administrators, after he or they should have ceased to be entitled to apply the same fund." There the Master of the Rolls treated the words "to the intent," and so on, just as I have treated them in the present case, as a proviso or qualification of the absolute covenant, and held that they merely limited the liability, and did not destroy it altogether, and were, therefore, not repugnant, and he accordingly held that the covenant must be construed as a covenant to apply a particular fund only in certain events, which was a perfectly good covenant, and that as the fund was not in the hands of the covenantors the covenantors were not then liable.

Which of those two cases is this? Do the words of this covenant purport to limit the liability of the defendants, or to destroy it altogether? In my opinion they purport to destroy it altogether. In the first place the words referring to personal liability are "but not so as to create any personal liability"—that is no personal liability of any kind is to be created by the covenant. Is any light then thrown upon those words—I mean any light in the sense of an indication that they are not to be construed so widely—by the preceding words "as such trustees"? Those words "as such trustees" again, in my view, in a covenant of this kind, have no effect at all. A covenant by a person "as trustee" does not render his trust estate liable, it is a covenant by himself. It is exactly as if an executor entering into an obligation not merely in respect of some debt of his testator, but in respect of some obligation which he in his capacity as executor has himself undertaken since the death of the testator, covenants "as executor" to pay. That is a covenant by himself. It was pointed out by Williams J. in Williams on Executors, 6th ed. p. 1636, and referred to in *Farhall* v. *Farhall* (1), that that is a covenant on which "the only possible judgment is de bonis propriis." So here the covenant by the defendants is a

(1) L. R. 7 Ch. 123, 128.

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covenant by them. The expression, therefore, "as trustees," in my judgment, does not in any way effectually limit the liability which the words purport to create.

The result is, I think, that first there is a covenant to pay the money and to indemnify, and then the parties have attempted to qualify that covenant by using words the effect of which, if effect is to be given to them, would be to destroy the personal liability. That being so, the words they have used can have no effect at law and the liability remains. It seems to me, therefore, on the deed as it stands that the plaintiff would be entitled to recover. The defendants have now a counter-claim by which they seek to rectify the deed, and I must hear what they can say about that.

[The counter-claim was then proceeded with and was ultimately dismissed.]

Solicitors: *Field, Emery, Roscoe & Medley, for Evan Morris & Co., Wrexham; Sharpe, Pritchard & Co., for Porter, Amphlett, Jones & Co., Conway.*

W. I. C.

In re BRAZILIAN RUBBER PLANTATIONS AND ESTATES, LIMITED.

NEVILLE J.

1910

Nov. 8, 10, 11, 15, 16, 17, 29.

[00317 of 1907.]

Company—Winding-up—Misfeasance—Directors' Gross Negligence—Duty of Directors — Misstatements in Prospectus — Directors deceived — Company formed to enter into specified Contract — Clause in Articles exempting Directors from Liability.

The B. Company was incorporated on January 31, 1906, with the object of purchasing certain estates in Brazil, and for that purpose entering with or without modification into a specified contract with a syndicate, which had been already prepared. On the same day the directors issued a prospectus inviting subscriptions for shares which contained statements, specially as to area of the estate and number of rubber trees thereon, which were untrue. These statements were taken from a report furnished to the directors by M., a member of a firm who had obtained an option to purchase the estate and had sold to the syndicate at an increased price. The report was fraudulent, but the directors believed it to be an honest report and adopted it without inquiry. Subsequently, before the whole of the purchase-money was paid, the directors received information from a manager whom they sent out to Brazil that the statements contained in the report and prospectus were untrue, but notwithstanding this they went on with and completed the purchase. The articles of association contained a provision that no director should be liable for any loss or damage occasioned by any error of judgment or oversight on his part or for any other loss, damage, or misfortune whatever which should happen in the execution of the duties of his office or in relation thereto, unless the same happened through his own dishonesty. The company having been ordered to be wound up compulsorily, the liquidator took out this summons claiming damages against the directors for misfeasance consisting in gross negligence in entering into the contract without proper examination and in not repudiating it when they discovered the errors in the report :—

Held, that the conduct of the directors did not amount to gross negligence. *Semble* even if it had been gross negligence the directors were protected by the provision in the articles.

Brazilian Rubber Plantations and Estates, Limited, was incorporated on January 31, 1906. The objects stated in the memorandum of association were, among others, to purchase from the Estates and Industrial Syndicate, Limited, certain estates consisting of about 12,500 acres situate in North Brazil, and to grow and cultivate rubber, cocoanuts, coffee, and other produce

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thereon, and to enter into and carry into effect with or without modification an agreement already prepared between the said syndicate and the company. The capital of the company was 180,000 shares of 1*l.* each. The agreement referred to was executed by the company, by order of the directors, on January 31, the same day as the incorporation of the company. It fixed the purchase price of the property mentioned in the memorandum at 150,000*l.*, to be paid as to 30,000*l.* in cash, as to 25,000*l.* in fully-paid shares, and as to 95,000*l.* in fully-paid shares or cash or partly in cash and partly in shares at the option of the company. The syndicate agreed to indemnify the company against the preliminary expenses, estimated at 5500*l.*, and to procure the underwriting of 50,000 shares, the company to pay a commission of 7½ per cent. on the nominal amount of such shares, and the syndicate to allow the amount of the commission to be deducted from the cash payable to them. The property to be purchased was described in the agreement by name only, but the purchase was to include all rubber trees, sugar canes, coffee trees, growing crops, certain specified machinery, and all machinery plant and fixtures.

The original owners of the property were Messrs. Holderness & Salgado, merchants, of Ceara, in Brazil. In October, 1905, Holderness, one of the partners, was in England and entered into negotiations with Messrs. C. W. & K. Meiter for the sale of the property, and ultimately gave them an option to purchase for 15,000*l.* On October 25, 1905, Messrs. Meiter gave W. H. Wood an option to purchase the property for 20,000*l.*

On October 30, 1905, W. H. Wood transferred the option to W. F. Harbord, who agreed to make a deposit of 250*l.* and to form a company to take over the purchase and pay the residue of the purchase-money to W. H. Wood.

Harbord then promoted the syndicate who had agreed to sell the property to the company. The syndicate was incorporated on January 13, 1906, with a capital of 50,000*l.* divided into 49,950 ordinary shares of 1*l.* each and 1000 deferred shares of 1*s.* each. Only seven of the ordinary shares were issued, all to nominees of Harbord, and nothing had been paid on them. The deferred shares were all issued to Harbord himself on the terms that they

should be paid for in cash. On January 15, 1906, Harbord entered into a contract with the syndicate to sell the property to them for 50,000*l.*, to be paid 20,000*l.* in cash and 30,000*l.* in fully-paid shares.

The directors of the company, Sir Arthur Aylmer, Bart., Henry William Tugwell, Edward Barber, and Edward Henry Hancock, were all induced to become directors by Harbord or persons acting with him in the promotion of the company. Sir Arthur Aylmer was absolutely ignorant of business. He only consented to act because he was told the office would give him a little pleasant employment without his incurring any responsibility. H. W. Tugwell was partner in a firm of bankers in a good position in Bath ; he was seventy-five years of age and very deaf ; he was induced to join the board by representations made to him in January, 1906. Barber was a rubber broker and was told that all he would have to do would be to give an opinion as to the value of rubber when it arrived in England. Hancock was a man of business who said he was induced to join by seeing the names of Tugwell and Barber, whom he considered good men.

These directors at a meeting held on January 31, 1906, approved a prospectus which was issued on February 1, 1906, offering for public subscription 145,000 shares. On the same day all the directors but Tugwell signed the agreement. The prospectus set out the dates of and the parties to all the contracts mentioned above, and stated that the amounts payable to the vendors were : To Walter Forsyth Harbord 50,000*l.*, 20,000*l.* in cash and the balance in cash or shares at the option of the company ; to William Haswell Wood 20,000*l.* in cash ; to Holderness & Salgado, of Ceara, Brazil, 15,000*l.* in cash. This statement was untrue, for the 30,000*l.* and 15,000*l.* were payable out of and not in addition to the 50,000*l.* But the prospectus contained the following more serious false statements about the property :—(1.) That the property contained 12,500 acres, whereas the real extent was about 2500 ; (2.) that there were on the property four well-built houses for officials and forty small houses for workpeople, whereas the buildings on the estate were in fact mere huts roughly put together, and there were none fit for the occupation of a European official ; (3.) that

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there were on the estate 400,000 trees of the species Hevea Brasiliensis, from which Para rubber, the best-known quality, was made, and Manicouba, from which a second quality of rubber, Ceara, was made, all scientifically planted, and about 20,000 older Manicouba trees. As a fact there were no Hevea Brasiliensis trees on the estate at all, and none scientifically planted; there were a large number of Manicouba trees, for the most part wild, but not more than 50,000 were fit for tapping. (4.) That the access to the estate was by an easy slope, and it was intended to make a tramway to the railway, which would be easy, for the rails could be made of iron-wood, of which there was plenty on the estate. The fact was that the estate was only accessible by a difficult mountain path which could only be used by mules accustomed to the mountains; it was impossible to make a tramway, and the iron-wood was hard only in name and quite useless for any purpose except burning. The prospectus also stated that it was estimated that the production of rubber would be 900,000 lbs., which at 5*s.* a pound would produce 225,000*l.*, while the cost of production and carriage to England would be 2*s.* a pound, but the directors preferred to base their estimate on half the estimated production, which would give a profit of 67,500*l.*, sufficient, after paying directors' fees and management expenses, to pay 25 per cent. on the 145,000 shares proposed to be now issued and leave an ample reserve. In fact the yield in rubber the year before the sale had been only 6000 lbs., and the profit about 1500*l.*, and it was quite impossible for many years to come that anything like half 900,000 lbs. of rubber could be produced in a year.

The statements in this prospectus were taken from a report presented to the directors on the same day by K. Meiter, one of the firm who had the original option to purchase the estate, and professed to be founded on his personal knowledge and inspection. He had in fact been in Brazil, but never anywhere near the property, and had made up the report in London from some correct but scanty data supplied by Messrs. Holderness & Salgado and his own imagination. The directors apparently accepted this report without any investigation or inquiry. At the same meeting they appointed a solicitor introduced by Harbord, who

had been clerk to the solicitor acting for the syndicate, and on March 15 they appointed in his place Foss (since deceased), whose firm had acted for the syndicate, and appointed Harbord their secretary.

Soon afterwards the directors sent out Hoffman as manager to Brazil to report on and take over the property, and provided him with a private code for telegraphing.

Before he arrived Holderness received from a correspondent a copy of the prospectus. On February 28 he cabled, and on April 18 wrote a letter to Foss protesting and pointing out the error in the size of the property and the enormous over-estimate of the possible production. Foss communicated this message and letter to Harbord, who was then secretary to the company, but it did not clearly appear whether they were communicated to the directors. Hoffman arrived in Brazil after Holderness had sent off the message and letter. But after seeing him, Hoffman sent a cable to the directors which, though it shewed that the statements in the prospectus as to the size of the property and number of the trees were wrong, contained as a statement of the general result of his inquiries the code word meaning "very satisfactory." Afterwards, when he had visited the property, he wrote full reports, but he never advised the directors to throw up the contract, and indeed advised them to hasten the transfer.

The company was ordered to be wound up compulsorily on January 14, 1908. This summons was taken out by the liquidator claiming damages against the directors to the amount of 80,000*l.* for misfeasance in issuing the prospectus and signing and carrying out the contract. The directors were not charged with fraud or personal dishonesty; the case against them was founded only on gross negligence.

The articles of association contained the following article, which was relied on in defence of the directors:—

"151. No director or any other officer of the company shall be liable for the acts, receipts, neglects, or defaults of any other director or officer, or for joining in any receipt or other act for conformity, or for any loss or expense happening to the company through the insufficiency or deficiency of title to any property

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acquired by order of the directors for or on behalf of the company or for the insufficiency or deficiency of any security in or upon which any of the moneys of the company shall be invested, or for any loss or damage arising from the bankruptcy, insolvency, or tortious act of any person with whom any moneys, securities or effects shall be deposited, or for any loss or damage occasioned by any error of judgment or oversight on his part, or for any other loss, damage, or misfortune whatever which shall happen in the execution of the duties of his office or in relation thereto, unless the same happen through his own dishonesty."

Gore-Browne, K.C., Hon. F. Russell, K.C., and *A. Sims*, for the liquidator. The directors by reason of their negligence in the conduct of the affairs of the company have caused heavy loss to the company and have thrown away some 30,000*l.* of the moneys of the company. Our complaint is that they made no sort of inquiry whether the prospectus was correct or whether the contract with the syndicate was a proper contract for the company to make: that alone was gross negligence. The evidence was that the original vendor was willing to sell for 15,000*l.*, and the only report on the property they had was that of Meiter, who they knew was interested in the sale, and they without inquiry bound the company to buy for 150,000*l.* We contend that the contract itself contained terms which no prudent man of business would have accepted for a company, 10,000*l.* cash was to be paid on allotment of shares before they had any opportunity to test the value of the property. They also paid other large sums of cash before they knew that the title was good and at a time when they knew that the original vendor impugned the statements in the prospectus. They also paid further sums after Hoffman's letters of April and May and before the dates on which they were payable under the contract. After Hoffman's letters they ought to have at once repudiated the contract. Article 151 of the articles of the company does not protect them. There was such negligence as amounted to a breach of duty: that is misfeasance within s. 215 of the Companies (Consolidation) Act, 1908. In *Lagunas Nitrate Co.* v. *Lagunas Syndicate* (1) Lindley M.R.

(1) [1899] 2 Ch. 392, 435.

says: "Negligence must be not the omission to take all possible care; it must be more blameable than that: it must be in a business sense culpable or gross." That proposition governs this case, and all the cases shew that directors must exercise reasonable care and must use their own judgment and not that of others: *Dovey* v. *Cory* (1); *In re National Bank of Wales, Ld.* (2); *In re New Mashonaland Exploration Co.* (3); *Marzetti's Case* (4); *Merchants' Fire Office, Ld.* v. *Armstrong* (5); *Leeds Estate, Building and Investment Co.* v. *Shepherd* (6); *Sheffield and South Yorkshire Permanent Building Society* v. *Aizlewood* (7); *Giblin* v. *McMullen.* (8) These directors did not do so. They ought not to have accepted Meiter's report without verification; they ought not to have parted with the balance of the purchase-money after they were put on inquiry by cablegram that the report was false in a most important particular; and they ought not then to have gone on with the contract as it stood, but should have stopped all further payments until they were satisfied that matters were all right. Therefore they were guilty of gross negligence. The measure of damages is the difference between the price paid and a fair value: *In re Leeds and Hanley Theatres of Varieties, Ld.* (9)

Buckmaster, K.C., and *Sargant*, for Tugwell. This prospectus contains admittedly false statements, but the directors are not charged with fraud or wrong-doing in respect of the prospectus. The allegation against them is for negligence in entering into the contract, but in order to succeed the liquidator must prove either dishonesty or culpable neglect. The public who subscribed for shares on the faith of the prospectus had the same knowledge, as the directors. All of them knew of the inflation in the price, but had no notice of the dishonesty of Meiter's report. He committed a great fraud, but how could the directors find that out? He had a good position in the City and had been abroad. In March Hoffman was sent out, with a marked prospectus, to

(1) [1901] A. C. 477, 489.
(2) [1899] 2 Ch. 629, 671.
(3) [1892] 3 Ch. 577, 586.
(4) (1880) 28 W. R. 541.
(5) [1901] W. N. 163.
(6) (1887) 36 Ch. D. 787, 804.
(7) (1889) 44 Ch. D. 412, 453, 459.
(8) (1868) L. R. 2 P. C. 317, 336.
(9) [1902] 2 Ch. 809, 827.

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report critically on the property, and in April he cabled "very satisfactory," and his letter received on May 31 said "get transfer through," and the board could not then repudiate or refuse to make further payments. Where a company is formed, as here, to carry out a particular contract, and they carry it out without knowledge of any wrong, they are not guilty of negligence. The principle of *Overend & Gurney Co.* v. *Gibb* (1) and *In re New Mashonaland Exploration Co.* (2) applies, and the first case shews that the company in this case had notice from the prospectus of the increase in price. The *Lagunas Case* (3) is most like the present case, but is distinguishable. There there was no independent board and the prospectus was issued after the company had entered into the contract. Here we have honest directors who had no greater knowledge than the shareholders. In *Dovey* v. *Cory* (4) money was paid away by directors to one of themselves. What gross negligence really is appears from *Marzetti's Case* (5), where a director paid away money without asking what it was for, and it was applied for a grossly improper payment.

[NEVILLE J. referred to *Sheffield and South Yorkshire Permanent Building Society* v. *Aizlewood.* (6)]

The directors cannot have imputed to them constructive knowledge of the misstatements in Meiter's report, as to which they were deliberately deceived: *English and Scottish Mercantile Investment Co.* v. *Brunton.* (7) They were appointed to carry out the contract, which was already cut and dried, and were only bound to examine further if they had reason to suspect dishonesty.

Even if the directors were wrong in signing the contract, Tugwell's case differs from the others, for he did not sign, and was not present at the meeting at which it was signed; he cannot be bound by what the others had done merely by hearing the minutes read afterwards. The directors cannot be liable for having paid some of the purchase-money in advance, for those payments caused no loss.

(1) (1872) L. R. 5 H. L. 480, 487, 502, 504.
(2) [1892] 3 Ch. 577.
(3) [1899] 2 Ch. 392, 435.
(4) [1901] A. C. 477, 484.
(5) 28 W. R. 541.
(6) 44 Ch. D. 412.
(7) [1892] 2 Q. B. 700, 708.

We also rely on article 151 of the articles of association. In *Molineaux* v. *London, Birmingham and Manchester Insurance Co.* (1) Cozens-Hardy L.J., delivering the judgment of the Court of Appeal, says, "The articles, though not themselves a contract between the company and the director, must be regarded as shewing the terms upon which on the one hand he agrees to act as director, and on the other hand the company agree to pay him remuneration for his services"; and Stirling J. in the earlier case of *Isaacs' Case* (2) proceeded on the same principle. Sect. 215 of the Companies (Consolidation) Act, 1908, on which the liquidator relies, does not give any new rights: Buckley on Companies, 9th ed. p. 495.

Martelli, K.C., and *Hodge*, for Hancock. It is said that none of the directors applied their minds to consider whether it was for the benefit of the company to adopt the contract. That depends on Meiter's report. If it was true, they were justified in going on with the contract. The complaint is that they made no inquiries, but Hancock, who was the working director of the company, unquestionably did make inquiries in the City about Meiter and submitted the prospectus to Webb, a member of a leading firm of solicitors in London, and received satisfactory replies. He could not know that Webb obtained his information from the promoters and he cannot be said to have been negligent. What more could he have done than send out a person to Brazil to report? And at whose expense? This would have occasioned several months' delay. But if he ought to have done this, no company could be formed to purchase property abroad. It is submitted that he did as much as could be reasonably expected of an honest man, and is not liable for errors of judgment if he committed any, and is protected by article 151. Further, if Meiter's report was true, and the directors bona fide believed it to be true, the contract was a good bargain for the company. The promoters were making only a cash profit of 4000*l.* out of the 30,000*l.*, and all the rest of the purchase price, 120,000*l.* in shares, was paper. Was it therefore such an exorbitant price? Moreover, the prospectus was so framed and the contracts were so disclosed

(1) [1902] 2 K. B. 589, 596. (2) [1892] 2 Ch. 158.

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as to conceal the fact that Meiter was one of the sub-vendors. Further, s. 87 of the Companies (Consolidation) Act, 1908, which re-enacts s. 6 of the Act of 1900, provides (inter alia) that a company shall not commence business until the whole amount of the minimum subscription has been allotted in shares payable in cash, and that any contract made by the company before that date is provisional only and not binding on the company until that date. Therefore this contract was not binding on the company until it had gone to allotment, and the members of the public who subscribed to the amount of minimum allotment adopted the contract and they came in with the same knowledge that the directors had, and it was not till then that the contract became binding. On the cables the directors were justified in carrying out the contract.

H. Dobb, for Sir A. Aylmer, and *Martelli, K.C.*, and *Rayner Goddard*, for Barber, besides adopting the same line of argument, contended that there was a case shewn for relieving Barber under the Companies (Consolidation) Act, 1908, s. 279.

Gore-Browne, K.C., in reply. *Overend & Gurney Co.* v. *Gibb* (1) was decided on the ground that negligence was not pleaded. *Gluckstein* v. *Barnes* (2) shews that the mere disclosure of the names to a contract is not sufficient. In *Giblin* v. *McMullen* (3), referred to by Romer J. in *Lagunas Nitrate Co.* v. *Lagunas Syndicate* (4), gross negligence is defined as the absence of such care as it was the duty of the defendant to use. Byrne J. laid it down in *Drincqbier* v. *Wood* (5) that "A director, consenting to be a director, has assumed a position involving duties which cannot be shirked by leaving everything to others."

[NEVILLE J. referred to Lord Macnaghten's observations in *Bentinck* v. *Fenn* (6) that an increase in price represented by shares might be disregarded.]

The result is that the public only get one-third of the property. The articles of association only directed the agreement to be accepted with or without modifications. It was the duty of the directors to examine the agreement to see what modifications

(1) L. R. 5 H. L. 480.
(2) [1900] A. C. 240.
(3) L. R. 2 P. C. 317, 336.
(4) [1899] 2 Ch. 392, 418.
(5) [1899] 1 Ch. 393, 406.
(6) (1887) 12 App. Cas. 652, 671.

were needed. Their negligence in not doing this was so gross as to be inconsistent with honesty.

Cur. adv. vult.

Nov. 29. NEVILLE J. The evidence in this case has been brought before the Court in a somewhat inconvenient manner, the public examination having been followed by affidavits upon which no cross-examination has taken place. Inasmuch, however, as the liquidator does not charge the respondents with dishonesty, but with negligence based in the main upon undisputed facts, this state of the evidence is of the less consequence. In my opinion it would have been impossible to sustain a charge of dishonesty against any of the respondents. They were, in my opinion, honest men, who performed what they supposed to be their duty as directors, whether or not they fell short in fact of the obligations imposed upon them by their office. Unfortunately for themselves, they fell into the toils of dishonest men. I have not the promoters of the company before me, and I am unable, therefore, to separate the knaves from their dupes; but it appears clear from the evidence that the report upon which the directors were asked to, and did, act was concocted in London, from the particulars furnished by the original vendors, who appear to have been straightforward men.

In dealing with these particulars, however, the authors of the report allowed their imagination free play. It was upon this report that the prospectus was founded, and it incorporated the misrepresentations contained in its source; notably an exaggeration with regard to the acreage, which was stated as approximately 12,500 acres, while it was reported by the company's agent to contain no more than 2000 acres at the outside, and a misstatement as to the number of trees fit for tapping, which was stated at 400,000 and which the agent of the company upon inspection declared to be 50,000. The contracts mentioned in the prospectus disclosed the fact that the original price paid to the vendors in Brazil, Holderness & Salgado, was 15,000*l.*, while the price to be paid by the company to the promoting syndicate was 150,000*l.*, payable as to 30,000*l.* in cash and as to 120,000*l.* in shares. It appeared that the syndicate had to find 20,000*l.* in cash for prior

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vendors; the preliminary expenses were put at 5500*l.*, while 3750*l.* was payable by the vendors for obtaining the underwriting of 50,000 shares at 7½ per cent.; so that the cash on the sale by the syndicate, which the company was bound to provide, shewed but a small profit.

In this connection, the observations of Lord Macnaghten in *Bentinck* v. *Fenn* (1) are important. There the price was 42,000*l.* Lord Macnaghten says: "Nor can the price be regarded as excessive. I think it must be taken that 5500*l.* was paid for the property. The new company gave 12,000*l.* in cash. I think we may leave out of consideration the portion of the purchase-money which was to be paid in shares, which represented the profit to be gained either from working the coalfield or from the credulity of the public." In that case, no doubt, there was an interval of two years between the purchase and the sale, and coal properties had appreciated in value. The difference, however, between a cash price and a price to be paid in shares from the investor's point of view is immense. In the latter case the value of the consideration paid to the vendors depends upon the success of the company. It is upon this question of price that the principal question in this case turns. The particulars of the property given in the report clearly justified the price to be given. But the argument on behalf of the liquidator is that the increase in price was of such a startling character that it ought to have caused the directors to suspect the accuracy of the report and prospectus, especially as it appeared that the report was made by Meiter, whose name appeared as a vendor in one of the contracts disclosed, and that they were bound to make further inquiries which it is suggested would have led to the exposure of the fraud. The matters complained of took place in 1906, the public examination was in 1908, and the matter comes before me in 1910.

I have to consider what is the extent of the duty and obligation of directors towards their company. It has been laid down that so long as they act honestly they cannot be made responsible in damages unless guilty of gross negligence. There is admittedly a want of precision in this statement of a director's

(1) 12 App. Cas. 652, 671.

liability. In truth, one cannot say whether a man has been guilty of negligence, gross or otherwise, unless one can determine what is the extent of the duty which he is alleged to have neglected. A director's duty has been laid down as requiring him to act with such care as is reasonably to be expected from him, having regard to his knowledge and experience. He is, I think, not bound to bring any special qualifications to his office. He may undertake the management of a rubber company in complete ignorance of everything connected with rubber, without incurring responsibility for the mistakes which may result from such ignorance; while if he is acquainted with the rubber business he must give the company the advantage of his knowledge when transacting the company's business. He is not, I think, bound to take any definite part in the conduct of the company's business, but so far as he does undertake it he must use reasonable care in its despatch.

Such reasonable care must, I think, be measured by the care an ordinary man might be expected to take in the same circumstances on his own behalf. He is clearly, I think, not responsible for damages occasioned by errors of judgment. It has been argued that in no case where he acts honestly can he be responsible for adopting a contract on behalf of a company which that company was formed to carry out; and certain passages in the case of *Overend & Gurney Co.* v. *Gibb* (1) have been referred to as supporting that view. It is said that directors of such a company have its express authority in the matter, and that the company cannot therefore complain. It appears to me, however, that where a discretion is left to the directors by the articles they are bound to exercise it with regard to adopting the agreement. The argument based on the company's authority appears to me to overlook the fact that the company, until in the hands of its own board, is but the creature of the promoters, unable to consider its own interest or act on its own behalf.

In this case, therefore, I must consider whether the directors acted without reasonable prudence in adopting the contract on the information which they possessed. I entirely concur in the

(1) L. R. 5 H. L. 480.

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view that this must not be tested by considering what the Court itself would think reasonable. The gravamen of the charge of negligence is based upon the absence of an independent report or opinion. Now, in my opinion, men in general take a very different view of the importance of independent testimony from that obtaining in the Courts. Business men have very frequently to act on information derived from interested persons. In so doing the wise men amongst them no doubt make an allowance for exaggeration, but exaggeration and fraud are not the same thing. If the report had been merely exaggerated, there was no fear of the company making a bad bargain ; there was ample margin to allow for exaggeration. The directors did make inquiries, but they were from persons whom, it is said, they ought to have known to be interested. One of them, Webb, was a person in a position entitling his opinion and word to great weight, and though reflection would have shewn the directors that he could not have been instructed to act on behalf of the company by persons independent of the promoters, I think the directors were not to be blamed for placing considerable reliance upon his assurances. A certain Lord B., who was at first proposed as a director, was by arrangement to consult his solicitors and to communicate the result to the others—Barber said only in case the report was unfavourable. He did not make any communication, but though he did not join the board himself, he put, as the directors supposed, his cousin upon it. Upon the whole I come to the conclusion that the directors believed that the contract was a beneficial one for the company, and that, notwithstanding the discrepancy in prices and the absence of an independent report, this conclusion was not arrived at by negligence on their part as directors.

In this connection it is to be noted that the prospectus did disclose all the facts which were proved to have been before the directors ; and apart from the question of whether the company can complain of the directors accepting a position on the basis of which, with notice of the facts, all its shareholders joined the company, there seems to me some difficulty in the face of these facts in saying that the position was one which no reasonable man would accept.

It appears to me that I have now disposed of the main point in the case, for if the contract was originally rightly entered into, the complaint of the subsequent conduct of the board in proceeding to carry it out, after receipt of Mr. Hoffman's information from Brazil, is really a complaint of want of sound judgment rather than of negligence. Mr. Hoffman, the manager, despatched by the company to the estate, was furnished with certain particulars, in respect of which he was asked to confirm the statements in the prospectus. Much reliance was placed on a cablegram of April 26, 1906, a letter dated April 18 received subsequently, and letters of April 27 and May 8. It is said that at each of these dates the information was of such a character as to make it the duty of the directors to give notice to the vendors to rescind the contract, or at all events to hold their hand until the matters had been more fully inquired into, instead of paying, as they did, further parts of the purchase-money to the vendors, some of which was not then due.

With regard to the cablegram, it is to be observed that the letter of April 18, setting forth the dissatisfaction of Holderness, one of the original vendors, with the statements in the prospectus, was written before Hoffman had visited the estate, and that, notwithstanding the statements of Holderness, after visiting the estate, Hoffman cables "Very satisfactory"—the strongest form of approval with which his special code provided him—and urges the hurrying forward of the transfer. It is upon this view of their agent upon the spot that the directors proceeded, and although subsequent letters confirmed the fact that the prospectus contained very serious misrepresentations, from first to last the manager never suggested the abandonment of the undertaking. I doubt if any of the directors were fully aware of their rights as to rescission, and they were never advised by their solicitor that the contract was not binding upon them. Nor, if they had known it, is there, in my opinion, anything to shew that they thought until after the completion that they had not got a valuable property which could be worked to the advantage of the company, however much it fell below the description in the prospectus. Indeed there is nothing in the evidence

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which to my mind explains the total collapse of the company which appears to have speedily followed. In my opinion there was no negligence shewn by the directors in carrying on the business after the contract became binding.

A further point was raised on behalf of the directors with which I ought to deal, although I have thought it right to deal with the evidence in the first instance. In *Molineaux* v. *London, Birmingham and Manchester Insurance Co.* (1) Cozens-Hardy L.J. says: "The articles, though not themselves a contract between the company and the director, must be regarded as shewing the terms upon which on the one hand he agrees to act as director, and on the other hand the company agree to pay him remuneration for his services." Here the articles of the company provide (article 151) as follows: "No director shall be liable . . . . for any loss, damage, or misfortune whatever which shall happen in the execution of the duties of his office or in relation thereto, unless the same happen through his own dishonesty."

I think upon its construction this article is intended to relieve directors who act honestly from liability for damages occasioned even by their negligence, where such negligence is not dishonest. And, having regard to the above decision, I do not see how to escape from the conclusion that this immunity was one of the terms upon which the directors held office in this company. I do not think that it is illegal for a company to engage its directors upon such terms. I do not think, therefore, that an action by this company against its directors for negligence, where no dishonesty was alleged, could have succeeded. It appears to me that an application under s. 215 of the Companies (Consolidation) Act, 1908, stands on the same footing: see per Lord Macnaghten in *Bentinck* v. *Fenn.* (2) Lord Macnaghten there says that misfeasance under the section must be misfeasance in the nature of a breach of trust resulting in a loss to the company. Breach of trust there, I think, is intended to include breach of duty: see per Lord Herschell in the same case. (3) It appears to me, therefore, that on this ground also the summons fails and must

(1) [1902] 2 K. B. 589, 596. (2) 12 App. Cas. 652, 669.
(3) 12 App. Cas. 662.

be dismissed with costs, the liquidator to pay these costs and retain his own costs out of the assets. (1)

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Solicitors: *Neve, Beck, & Kirby; Coward, Hawksley & Co.; Maples, Teesdale & Co.; Sparks & Russell; Gasquet, Metcalfe & Co.*

J. R. B.

In re WILLIAMS' SETTLEMENT. WILLIAMS *v.* WILLIAMS.

EVE J.
1910
Dec. 7.
1911
Jan. 16, 26.

[1910 W. 2676.]

Marriage Settlement — Wife's Covenant to settle after-acquired Property — Construction—"Become entitled to any estate or interest"—Assignment of even Date by Wife—Ultimate Trust for Wife—Wife's Contingent Interest—Vesting in Possession during Coverture—Change of Interest—Operation of Covenant.

Upon attaining the age of twenty-one years in 1907, the plaintiff became absolutely entitled in possession to one-third of her parents' marriage settlement funds and was contingently entitled to a further one-third share in the same funds upon the death of either of her two younger brothers before attaining the age of twenty-one years.

In contemplation of her marriage in 1909 the plaintiff by deed assigned (inter alia) her one-third share of certain mortgage debts constituting part of her late mother's marriage settlement fund "and all other if any her share and interest in the said mortgage debts" to trustees upon trust after the marriage to raise thereout, and out of certain stocks, funds, and securities already transferred, the sum of 12,000*l.*, and subject thereto to stand possessed of the premises thereby assigned and the said stocks, funds, and securities in trust for the plaintiff absolutely. By her marriage settlement of even date the 12,000*l.* was settled upon the usual trusts of a wife's fund, and the plaintiff thereby covenanted with the trustees that if she should at any time during the intended coverture "become entitled in any manner and for any estate or interest" to any real or personal estate exceeding in value 500*l.* at one time and from one and the same source (except as therein mentioned) she would convey the same to the trustees upon trust to sell and convert (a reversionary interest not to be sold except for special reason before it fell into possession) and to hold the proceeds upon the trusts of the wife's fund.

Her younger brother Francis died under the age of twenty-one years shortly after the plaintiff's marriage:—

Held, (1.) on the authority of *In re Holford*, [1894] 3 Ch. 30, that the

(1) This report has been held back by reason of an appeal being contemplated which ultimately was not prosecuted.

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plaintiff's interest on attaining twenty-one in the shares to which her younger brothers were entitled contingently on their attaining twenty-one in their parents' marriage settlement funds was a contingent and not a vested interest.

(2.) That the plaintiff's contingent interest in Francis's share of the mortgage debts passed by the assignment to the trustees, and that, subject to raising the 12,000*l.*, the moneys representing such share were payable to the plaintiff unaffected by her covenant, which must be read and construed in the light of the trusts contained in the assignment of even date and not so as to defeat those trusts; and

(3.) on the authority of *Archer* v. *Kelly*, (1860) 1 Dr. & Sm. 300, that the plaintiff's share in her parents' marriage settlement funds (other than the mortgage debts) which fell into possession on her brother Francis's death was caught by the covenant in her settlement.

ADJOURNED SUMMONS.

Previous to her marriage in October, 1909, the plaintiff was absolutely entitled in possession to a one-third share of certain undivided interests in three mortgage debts, and to certain stock and investments standing in her own name, all of which represented the one-third share to which she had become entitled upon attaining twenty-one in June, 1907, in the trust funds brought into settlement by her father and mother and comprised in their marriage settlements. The plaintiff was also contingently entitled to a further one-third share in the same trust funds in the event (which happened shortly after her marriage) of one of her two younger brothers dying before attaining twenty-one.

By a deed of assignment executed immediately before her marriage settlement—both dated October 11, 1909, and executed in contemplation of her marriage, subsequently solemnized, with the defendant Lawrence Williams—the plaintiff assigned to the trustees all the respective share and interest to which she was entitled in the said mortgage debts and all interest due and to become due in respect thereof and the benefit of all securities for the same, and also all her share and interest in the unadministered personal estate of her late father and "all other if any the share and interest" of her "in the said mortgage debts and unadministered personal estate" upon trust after the marriage to raise thereout, and out of certain stocks, funds, and securities already transferred to the trustees, the sum of 12,000*l.*

to be held upon the trusts concerning the same declared by her marriage settlement, and subject thereto to stand possessed of the premises thereby assigned and of the said stocks, funds, and securities upon trust for the plaintiff absolutely.

Her marriage settlement declared the trusts of the 12,000*l.* "wife's trust fund" and contained a covenant by the plaintiff with the trustees "that if she should at any time during the now intended coverture become entitled in any manner and for any estate or interest to any real or personal property exceeding in value 500*l.* at one time and from one and the same source" (with certain exceptions not material to be stated) "then and in every such case she and all other necessary parties will at the cost of the trust estate as soon as may be and to the satisfaction of the trustees convey such real or personal property to the trustees" upon trust for sale or conversion as therein mentioned (with a discretionary power in the trustees to postpone and so that a reversionary interest be not sold before it fell into possession unless the trustees saw special reason for sale), and the money arising from such sale or conversion was to be held by the trustees so as to form one fund for all purposes with the wife's trust fund thereinbefore settled.

Her younger brother Francis died while still a minor some months after the plaintiff's marriage.

This was a summons by the plaintiff against her husband and the trustees of her marriage settlement for the determination of the question whether the shares to which she became entitled on the death of her brother Francis (1.) of and in the mortgage debts above mentioned and other her mother's settlement trust funds and (2.) of and in her father's settlement trust funds became and were subject to her covenant to settle after-acquired property.

The facts and contents of the deeds are more fully stated in the judgment.

P. O. Lawrence, K.C., and *A. àB. Terrell*, for the plaintiff. Assuming, in the first instance, in deference to the view expressed by Lindley L.J. when considering a different question in *In re Holford* (1), that previously to the execution of the deeds of

(1) [1894] 3 Ch. 30.

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assignment and settlement the plaintiff's interest in the remaining two-thirds of her parents' marriage settlement trust funds was contingent, then the question arises whether that contingent interest on falling into possession during the coverture is caught by the covenant. We submit that the covenant was intended to affect only property which was wholly future. The words are "become entitled to any estate or interest," and cannot extend to an already contingent interest to which she was then entitled and which subsequently fell into possession. According to the law as laid down in *In re Clinton's Trust* (1) and *In re Bland's Settlement* (2), the covenant applies only to property acquired in title in futuro. The facts shew that the covenant relates to property other than what she knew she had at the time of marriage, and if her absolute vested interest is to be affected by the covenant, then that would amount to the same thing as settling the contingent interest which she knew she had. The question of marital right does not enter into consideration in this case. This contingent interest was the plaintiff's at the date of the marriage and she could have sold it the day after if she had been so minded.

Brooks v. *Keith* (3) was the case of a settlement in 1842 where the husband also joined in the covenant, and seems to have been decided solely on the ground that the object of the covenant was only to affect such property as the husband would otherwise have become entitled to; that cannot apply here. *In re Worsley's Trusts* (4) also is not applicable, for there the wife was an infant and the words were "seised or possessed of" and the settlement was intended to deal with all the property she had.

In *Archer* v. *Kelly* (5) an ante-nuptial contingent interest falling into possession during coverture was held bound, but the words of the covenant in that case were very wide and on a different footing from those of this covenant, in which the words point to the acquisition of any interest, and not to change of interest.

With regard to the property comprised in the assignment it is clear that the assignment was only to secure 12,000*l.* and that

(1) (1872) L. R. 13 Eq. 295, 305.
(2) [1905] 1 Ch. 4.
(3) (1861) 1 Dr. & Sm. 462.
(4) (1867) 16 L. T. 826.
(5) 1 Dr. & Sm. 300.

the surplus belongs to the plaintiff absolutely and is unaffected by her covenant.

Further, it was not necessary for the decision of *In re Holford* (1) that Lindley L.J. should go so far as to abrogate the well-settled rule that under a gift to children contingently on their attaining twenty-one the first child to attain twenty-one took a vested interest in the whole fund. It would have been sufficient to hold that the infant children had a contingent interest in the income. But we submit that the rule applies here, and that the plaintiff on attaining twenty-one acquired a vested interest in the whole of her parents' marriage settlement trust funds, which interest was not intended to be and was not in fact affected by the covenant; and in construing a covenant of this kind the Court can look at the surrounding circumstances: *Williams* v. *Mercier*. (2)

R. A. Griffith, for the defendants. Nothing passed by the deed of assignment except the property specifically assigned, and that was her own one-third absolute share and not her contingent interest in her brother's share of the mortgage debts. A particular description is not enlarged by another assignment in the same document. There is nothing in the deed, recitals, or schedules to shew an intention to assign anything that was not absolutely vested in the plaintiff at the time, and I submit that the deed must be restricted in its operation to her absolute vested share in these mortgage debts—*Howard* v. *Earl of Shrewsbury* (3); *Jenner* v. *Jenner* (4)—and that the contingent interest was not the subject of the assignment. But even if it was, I submit that by virtue of the trusts of that deed the plaintiff has since her marriage become entitled to such an estate or interest as will be affected by her covenant.

Apart from the deed of assignment, however, the share in her parents' marriage settlement funds to which the plaintiff became entitled on the death of her brother is caught by her covenant. *Archer* v. *Kelly* (5) is not distinguishable from this case, and shews that the vesting in possession during the coverture was

(1) [1894] 3 Ch. 30.
(2) (1884) 10 App. Cas. 1, 8.
(3) (1874) L. R. 17 Eq. 378, 391.
(4) (1866) L. R. 1 Eq. 361.
(5) 1 Dr. & Sm. 300.

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such a change of condition in the plaintiff's interest as to bring it within her covenant.

In re Clinton's Trust (1) does not help the plaintiff, and I submit that this case comes within the first of the three categories given by the Vice-Chancellor in his judgment. Both in that case and in *In re Bland's Settlement* (2) the wife had a vested reversion before marriage, but here she had a defeasible contingent interest only, and this is a stronger case of change of condition or title. There has been an expansion of that interest since the marriage, and whether the covenant is construed as meaning "become entitled" in interest, or in possession, I submit that she has become entitled to such estate or interest as will in either case be caught by the covenant: *Archer* v. *Kelly* (3), referred to with approval by Cotton L.J. in *In re Michell's Trusts.* (4)

P. O. Lawrence, K.C., in reply, referred to *Gray* v. *Earl of Limerick* (5) and Norton on Deeds.

Cur. adv. vult.

1911. Jan. 26. EVE J. The plaintiff was married to the defendant Lawrence Williams in the month of October, 1909. The other defendants are the trustees of the settlement executed on the marriage, and the questions raised by the summons involve the construction of the covenant on the part of the plaintiff as to the settlement of her after-acquired property.

The plaintiff attained the age of twenty-one in June, 1907. Prior to that date both her parents had died, and at the date of the settlement made on her marriage she was in the events which had happened absolutely entitled in possession to one-third of the property settled by two settlements made on the occasion of the marriage of her parents and to one-fourth of the outstanding personal estate of her deceased father. The one-third was represented by certain stocks, funds, and securities then already transferred into the plaintiff's name, by certain undivided interests in three sums of money amounting to 7000*l.*, 10,000*l.*, and 17,000*l.* respectively invested on mortgages and

(1) L. R. 13 Eq. 295.
(2) [1905] 1 Ch. 4.
(3) 1 Dr. & Sm. 300.
(4) (1878) 9 Ch. D. 5, 11.
(5) (1848) 2 De G. & Sm. 370.

constituting part of the mother's settlement funds, and by one-third of a sum of 13,000*l.* originally invested on mortgage and constituting the father's settlement funds.

At the same date each of the plaintiff's two brothers was entitled to a third of the parents' settlement funds contingently on his attaining twenty-one. It is the subsequent death of one of these brothers before attaining twenty-one which has given rise to the questions I have now to determine.

It will be convenient if I here dispose of one point submitted on the plaintiff's behalf by saying that on the authority of the judgment of the Court of Appeal in *In re Holford* (1) I hold that the plaintiff's interest on attaining twenty-one in the shares to which her infant brothers were entitled contingently on their attaining twenty-one was not a vested but a contingent interest. She was therefore at the date of her settlement absolutely entitled to one third share and contingently entitled to the remaining two third shares.

The settlement was effected by two deeds, both dated October 11, 1909, the plaintiff, her intended husband, and the trustees being the parties. By the first deed, after recitals that the plaintiff was absolutely entitled to the stocks, funds, and securities specified in the first schedule and to the undivided interest in the three mortgage debts specified in the second schedule and to one fourth of her father's unadministered personal estate, that upon the treaty for the intended marriage it had been agreed that the said stocks, funds, and securities, and shares of mortgage debts and personal estate should be transferred and assigned to the trustees upon the trusts thereinafter declared, and that the scheduled stocks, funds, and securities had been or were intended forthwith to be transferred into the names of the trustees, the plaintiff, with the approbation of her intended husband, assigned to the trustees all her said respective shares and interests in the said mortgage debts and the benefit of all securities for the same and her said share and interest in her late father's unadministered personal estate "and all other (if any) her share and interest in the said mortgage debts and unadministered personal estate" upon trust as soon as might be

(1) [1894] 3 Ch. 30.

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after the marriage to raise thereout a sum of 12,000*l.* and to stand possessed of such sum upon the trusts of the indenture of even date, and subject thereto to stand possessed of the premises thereby assigned and of the said stocks, funds, and securities upon trust for the plaintiff absolutely.

By the deed of even date the sum of 12,000*l.* to be raised was settled upon the usual trusts of the wife's fortune, and the plaintiff thereby covenanted with the trustees that if she should at any time during the then intended coverture become entitled in any manner or for any estate or interest to any real or personal property exceeding in value 500*l.* at one time and from one and the same source (except as therein mentioned), then and in every such case she and all other necessary parties would convey such real and personal property to the trustees upon trust for conversion as therein mentioned (with a discretionary power to postpone and so that a reversionary interest should not except for special reason be sold before falling into possession) and to be held so as to form one fund for all purposes with the wife's fortune.

The first question of construction arises under the assignment. Did it extend so as to include the plaintiff's contingent interests in her brothers' shares of the mortgage debts, and if it did so extend the further question then arises, is the plaintiff's interest in the share of the brother who has since died held upon trust for the plaintiff absolutely, or is it caught by the covenant to settle her after-acquired property?

I answer the first of these questions in the affirmative. The assignment is an assignment of the undivided shares to which the plaintiff is recited as being entitled in the mortgage debts and of all other (if any) her share and interest therein. It is expressed in terms which are plain and unambiguous, and while, in my opinion, the construction I adopt is in no way inconsistent with the recitals or the general tenor and purport of the deed, the construction which would exclude the contingent interests really strikes out of the deed the words "and all other (if any) her share and interest in the said mortgage debts." The contingent interests were, therefore, part of the premises assigned to the trustees and might have been resorted to for contribution towards

the 12,000*l.*, subject to this they are held under the assignment upon trust for the plaintiff absolutely. But it is argued on behalf of the trustees that, the contingent interest which the plaintiff had at the date of the assignment in the share of the brother who has since died under twenty-one having fallen into possession during the coverture, the moneys representing such interest are now bound by the covenant in the settlement and are payable to them thereunder and not to the plaintiff under the ultimate trust in the assignment.

I do not accept this view. In my opinion whatever passed to the assignees under the first of the two deeds of October 11 is held by them upon the trusts of that deed wholly unaffected, except to the extent of the 12,000*l.*, by the trusts of the second deed of the same date, and the covenant to settle after-acquired property in the second deed, assuming it to be so framed as in terms to cover some of the property assigned by the first deed, must be read in the light of the trusts contained in the first deed and so construed as not to defeat those trusts. Had the contingent interest alone been assigned upon trust to raise by sale, mortgage, or otherwise the sum to be settled, and subject thereto upon trust for the assignor, had the assignor by a contemporaneous deed covenanted to settle all property falling into possession during coverture, and had the contingent interest before any sale or mortgage fallen into possession, could it have been successfully argued that the surplus proceeds after providing the settled sum were caught by the covenant? I think not, and it cannot make any difference that the assignment included other property. I hold, therefore, that the moneys representing the plaintiff's interest in her late brother's share of the three mortgage debts are payable to her and are not subject to the covenant contained in the settlement.

But a further question arises with respect to the plaintiff's share of the property other than the mortgage debts which has fallen into possession by the death of her brother. This is not affected in any way by the assignment, and the question turns solely upon the covenant in the settlement. The covenant, it is to be observed, is so framed as to be applicable to after-acquired property only and is wide enough to cover any contingent interest

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coming into existence after the commencement of coverture. Does such a covenant sweep in property in which the covenantor had a contingent interest at the date of the marriage and which falls into possession during coverture?

I think the answer to that question is supplied by authority. In *Archer* v. *Kelly* (1) Kindersley V.-C. had to construe a covenant relating, as the covenant does here, solely to property to be acquired after the marriage. The language there was that if the husband and wife or either of them in her right should "by gift, descent, succession or otherwise howsoever, become entitled to any real or personal estate," &c., and the Vice-Chancellor, in holding that a share in realty to which the wife was contingently entitled at the date of her marriage and which fell into possession during the coverture was within the covenant, observed, "The word 'become' in its usual and proper acceptation imports a change of condition, that is the entering into a new state or condition by a change from some former state or condition. The word 'entitled' may mean entitled in possession, or entitled in reversion or remainder." And then, having stated that at the time of the marriage the wife's interest was contingent on an event which had happened during the coverture whereby the wife had become entitled to a vested estate, he proceeds: "There is a change in the condition of her estate or interest in the property; she has during the coverture become entitled to the property for a new estate or interest, and therefore this property falls within the terms of the covenant. The plain and natural import of the terms of the covenant has been complied with."

Here the language is if the wife "should at any time during the coverture become entitled in any manner and for any estate or interest to any real or personal property," and I cannot see any substantial difference between this covenant and that in *Archer* v. *Kelly*. (1) Nor do I think any doubt is thrown upon the correctness of that decision by anything that was decided or implied either in *In re Michell's Trusts* (2) or in *In re Bland's Settlement*. (3)

(1) 1 Dr. & Sm. 300, 304, 305.
(2) 9 Ch. D. 5.
(3) [1905] 1 Ch. 4.

Accordingly I decide that the plaintiff's share in the property other than the mortgage debts which fell into possession on the death of her brother is within the terms of the covenant in the settlement.

Solicitors: *Leman & Co.; Peacock & Goddard, for S. R. Dew, Bangor.*

R. M.

In re LLEWELLYN.
LLEWELLYN *v.* LLEWELLYN.

[1910 L. 2399.]

Settled Land—Devise to Trustees in Fee Simple—Use for Accumulation of Rents until Son attained twenty-seven—Subject thereto, to Use of Son for Life—Son not yet twenty-seven—Person having the Powers of a Tenant for Life—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-ss.* 5, 7, 10; *s.* 58, *sub-s.* 1, *cl. vi.*

The testator devised certain real estate unto and to the use of his trustees in fee simple to the use that it should be lawful for them to receive the rents, profits, and annual income thereof until his son, the applicant, attained the age of twenty-seven years, paying thereout during such time the annual sum of 400*l.* to the applicant, and to accumulate the surplus which should devolve upon the same uses as the property itself, and subject thereto to the use of the applicant and his assigns during his life, with remainders over:—

Held, that the applicant, who had not yet attained the age of twenty-seven years, was by virtue of the provisions of s. 58, sub-s. 1, cl. vi., of the Settled Land Act, 1882, a person having the powers of a tenant for life under that Act.

ADJOURNED SUMMONS.

By his will the testator gave and devised certain real estate in the county of Glamorgan unto and to the use of his trustees in fee simple to the use that it should be lawful for his trustees to receive the rents, profits, and annual income thereof until his son G. R. P. Llewellyn (the applicant) attained the age of twenty-seven years, paying thereout during such time the annual sum of 400*l.* to his said son, and to accumulate the surplus which should devolve upon the same uses as the property itself, and subject thereto to the use of his said son and his assigns

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during his life without impeachment of waste, with divers remainders over.

The testator died on February 10, 1910, and the trustees had gone into possession. The applicant, who had attained his majority but had not yet reached the age of twenty-seven years, took out this summons for the determination (inter alia) of the question whether he was entitled to exercise the powers of a tenant for life under the Settled Land Acts, 1882 to 1890, in respect of the devised real estate before attaining the age of twenty-seven years.

Rowlands, for the applicant. I submit that the applicant comes within s. 2, sub-ss. 5, 7, and s. 58, sub-s. 1, cl. vi., of the Settled Land Act, 1882. The estate given to him by the will is not a future estate, but is an immediate estate subject to the directions contained in the will. *In re Jones* (1) shews that although real estate was devised subject to a term of 2000 years, yet the estate of the tenant for life was an estate in possession and not in remainder.

The trust in the present case is either an incumbrance within the meaning of s. 2, sub-s. 7, or is a trust for accumulation within the meaning of s. 58, sub-s. 1, cl. vi.

In *In re Clitheroe Estate* (2) there was a term of 1300 years subject to a trust for accumulation and the person to whom the estate subject to the term was limited was held to be a person having the powers of a tenant for life within the meaning of s. 58, sub-s. 1, cl. vi. I rely on that decision.

In re Strangways (3) is distinguishable from this case, for there the life estate was an estate in remainder after the term; it was not an immediate estate subject to the term or subject to a trust for accumulation.

[JOYCE J. referred to *Annesley* v. *Woodhouse*. (4)]

MacSwinney, for the trustees. The first question is the construction of the will read with the Act of Parliament. The words "and subject thereto" will not of themselves necessarily give the applicant an estate in possession; they operate on the

(1) (1883) 26 Ch. D. 736.
(2) (1885) 31 Ch. D. 135.
(3) (1886) 34 Ch. D. 423.
(4) [1898] 1 I. R. 69.

son attaining twenty-seven and not before. Further, the trustees are to receive the whole of the rents and profits and the trustees have gone into possession. The fact that the applicant is to receive 400*l.* a year until he attains twenty-seven does not affect the question.

[JOYCE J. If an advowson had formed part of the settled property and the benefice fell vacant before the son attained twenty-seven, who would be entitled to present?]

The trustees, I submit: *Cooke* v. *Cholmondeley* (1); *In re Shrewsbury School.* (2)

[JOYCE J. referred to *In re Martyn.* (3)]

I submit that the decision in *In re Martyn* (3) is inconsistent with the dicta of the Court of Appeal in *In re Strangways.* (4) Cotton L.J. says that in order to come within s. 58, sub-s. 1, cl. vi., there must be an immediate present estate for life. Unless he is tenant for life in possession the trust for accumulation does not help him.

[JOYCE J. referred to *In re De Hoghton.* (5)]

I submit that the words "or other purpose" in s. 58, sub-s. 1, cl. vi., mean some other purpose ejusdem generis with "accumulation of income for payment of debts" and cannot apply to a trust to accumulate for the purpose merely of increasing capital.

There are no incumbrances, debts, or portions in this case to be cleared off, and the only thing the applicant relies upon is the trust for accumulation, and, as Cotton L.J. pointed out in *In re Strangways* (4), the applicant cannot say "Hand over the rents to me, and I will provide for the direction to accumulate," for there is a direction to the trustees to take all the rents and apply them for a particular purpose until he attains twenty-seven. The observations of Pearson J. in *In re Atkinson* (6), affirmed on appeal (7), apply to this case, and I submit that before the applicant attains the age of twenty-seven years he is not a person entitled to exercise the powers of the Settled Land Acts.

Rowlands in reply.

(1) (1854) 3 Drew. 1.
(2) (1836) 1 My. & Cr. 632.
(3) (1900) 69 L. J. (Ch.) 733.
(4) 34 Ch. D. 423, 431.
(5) [1896] 1 Ch. 855, 861, 867—869.
(6) (1885) 30 Ch. D. 605.
(7) (1886) 31 Ch. D. 577.

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JOYCE J. stated the will as above set out, and continued:—All the parties agree that the fact that the 400*l.* a year was payable out of the income to the applicant makes no difference; therefore for present purposes this is equivalent to a devise to the use of the trustees to receive the rents and profits and capitalize them until the testator's son should attain twenty-seven and subject thereto to the use of the son for life, and the question is whether the son is tenant for life under the provisions of s. 2 of the Settled Land Act, 1882, or is under the provisions of s. 58 a person who has the powers of a tenant for life under that Act.

Now I have serious doubt whether quite apart from the Act the applicant be not now tenant for life although he has not attained twenty-seven, and I am not at all sure that, if an advowson were part of the settled estates and the benefice fell vacant, he would not be the person to present. But if he be not now tenant for life according to the true construction of this will, I am of opinion at all events that he is a person who under the 58th section has the powers of a tenant for life under the Act as if he were a tenant for life as defined in the Act.

I see no reason why I should not follow the decision of Kekewich J. in *In re Martyn* (1) and also the decision in *Annesley* v. *Woodhouse* (2) in the Irish Courts to the same effect, where the trust was to collect the rents until a certain sum of money was raised. I see no reason to quarrel with those decisions, and I therefore think that the applicant is at least in the same position as if he were tenant for life. There is nothing against that, to my mind, in any of the observations in *In re Strangways* (3) when the facts of that case are considered with reference to which those observations were made. *In re Strangways* (3) was a case in which clearly nothing whatever was given to Mr. Strangways, who claimed to be tenant for life, until after the expiration of a certain term of twenty-one years. Here, subject to this trust with regard to the rents and profits —and I need not go into the question of whether it is discretionary or not—the applicant is tenant for life under the will. I am of opinion that under s. 58, sub-s. 1, cl. vi., he is in the same

(1) 69 L. J. (Ch.) 733. (2) [1898] 1 I. R. 69.
(3) 34 Ch. D. 423, 431.

position as if he were tenant for life and therefore has the powers of a tenant for life with reference to this estate.

Solicitors: *S. F. Miller, Vardon & Miller.*

R. M.

In re FORD.

MYERS *v.* MOLESWORTH.

[1910 F. 774.]

Will—Construction—Arrears of Rent—Accruing Rent—Apportionment Act, 1870 (33 & 34 Vict. c. 35)—Tithe Rent-charge—Net or Gross Rents.

F., who was tenant for life of the P. settled estates, by her will bequeathed "to the person who upon my death shall become entitled in possession to the P. settled estates all arrears of rent in respect of the same estates which shall then be due to me." The testatrix died on March 4. By the custom of the estate the rents, though due according to the agreements quarterly, were collected half-yearly at Michaelmas and Lady Day:—

Held, that the bequest included not only all arrears due at the preceding Michaelmas and unpaid, but the rents due at Christmas and the apportioned part accrued from Christmas to the death; that arrears of tithe rent-charge were also included; and that the bequest carried the gross rents without any deductions for collection or outgoings.

MARY FORD, widow, who was at the date of her will and death tenant for life of the Pencarrow and Telcott settled estates in Cornwall and Devon, by her will, dated April 2, 1908, after giving certain jewels and other articles and money to purchase certain pictures and furniture to be settled as heirlooms to go with the settled estates, continued: "I bequeath to the person who upon my death shall become entitled in possession to the Pencarrow and Telcott estates aforesaid all arrears of rent in respect of the same estates which shall then be due to me"; and after giving certain large legacies she gave her residuary estate to trustees upon trust for sale and conversion and to pay debts and legacies and apply the balance of such proceeds or a sufficient part thereof "in or towards payment off of all mortgages and incumbrances on the Pencarrow and Telcott estates which shall be subsisting at my death."

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The testatrix died on March 4, 1910.

The rents belonging to the estate were payable quarterly according to the tenancy agreements on the usual quarter days, but were by custom paid half-yearly at Michaelmas and Lady Day. At the testatrix's death some of the rents due at the preceding Michaelmas, all the rents legally due at Christmas, and the apportioned part of rents from Christmas to date were still unpaid. The estate comprised some impropriate tithe rent-charge, part of which was also unpaid.

This summons was taken out by the trustees of the will for the determination of the questions (1.) whether the bequest of arrears of rent included the apportioned parts, up to the time of the testatrix's death, of the accruing rents of the current quarter or half-year ending on March 25, 1910, or whether it passed only the rents which had become payable by the tenants under their leases or agreements on or before December 25 and remained unpaid; (2.) whether the bequest included arrears of tithe rent-charge; and (3.) whether the bequest was of gross rents or the trustees were entitled to make deductions for costs of collection, interest on mortgages, expenses of upkeep, and outgoings.

The defendants were Sir Lewis William Molesworth, who became tenant for life in possession on the testatrix's death, a tenant for life in remainder, and his son, who was the first tenant in tail under the settlement.

Hon. E. C. Macnaghten, K.C., and *K. G. Metcalfe*, for the trustees.

Micklem, K.C., and *Kenneth Wood*, for Sir Lewis William Molesworth. Sir George Jessel M.R. in *Hasluck* v. *Pedley* (1) stated that the result of the Apportionment Act is that "the rent up to the death of the testator becomes arrears of rent." Fry L.J. cited that statement with approval in *In re Lucas* (2), but the other members of the Court of Appeal decided that in that case the apportioned rents did not pass. It was held that they did pass under similar words in *Stapleton* v. *Stapleton*. (3) In this case the testatrix's intention was to benefit the next tenant for life, and it is clear that the apportioned rents ought to pass.

(1) (1875) L. R. 19 Eq. 271, 273. (2) (1885) 54 L. T. 30.
(3) (1852) 2 Sim. (N.S.) 212.

Tithe rent-charge is clearly "rent"—see Lord Selborne's judgment in *Commissioners of Church Temporalities in Ireland* v. *Grant* (1)—and the arrears must be included. There is no reason for making any deductions here; there is nothing to imply a gift of net rents only. The question is probably asked because of the decision in *In re Duke of Cleveland's Estate* (2), but in that case there was a special direction to deduct outgoings.

Rawlins, K.C., and *Muir Mackenzie*, for the defendants entitled in remainder. The testatrix's paramount intention was to benefit the settled estates, not so much the tenant for life, as appears from her whole will. There is no legal construction of the word "arrears" which can be applied here; its natural meaning is something which has become due and has not been paid. That is the definition in *In re Lucas* (3) and it applies in this case. The only point decided in *Hasluck* v. *Pedley* (4) was that the Apportionment Act applies to a specific devise. In *Stapleton* v. *Stapleton* (5) the words were "rent and arrears of rent"; there is no case where "arrears of rent" alone has been held to include apportioned rents.

As to the outgoings the testatrix meant to put Sir Lewis William Molesworth into the same position as she was herself, i.e., that he should only take net rents. The case of *In re Duke of Cleveland's Estate* (2) shews that in order to ascertain what is given and what charges ought to be deducted the Court will look at the practice of the estate. According to the practice of the estate only the Michaelmas rents were due at the testatrix's death.

SWINFEN EADY J. The first question raised by this summons is, what is the true meaning of the bequest of all arrears of rent due to the testatrix at her death? [His Lordship read the bequest, and continued.]

It is said that the gift ought to be confined to the rents accrued due at the preceding Michaelmas, or at any rate to those accrued due at Christmas. The testatrix died on March 4, 1910, and

(1) (1884) 10 App. Cas. 14, 30.
(2) [1894] 1 Ch. 164.
(3) 54 L. T. 30.
(4) L. R. 19 Eq. 271.
(5) 2 Sim. (N.S.) 212.

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according to the course of management of the estates the Midsummer rents were collected at Michaelmas and the Christmas rents in March. In my opinion the language of the bequest is wide enough to include all rents accruing up to the date of the death. In *Hasluck* v. *Pedley* (1) Sir George Jessel M.R., after referring to s. 2 of the Apportionment Act, 1870, said: "The result of that is, that the rent up to the death of the testator becomes arrear of rent, and is to be dealt with in the same way as arrear of rent would have been dealt with before the Act. A testator may, of course, give arrear of rent specifically, and if so given the arrear of rent will go to the specific legatee; otherwise it will fall into the general personal estate." It is obvious that in saying that arrear of rent might be given specifically he was referring to the rent up to the death which he had previously mentioned as becoming arrear of rent. This decision was referred to with approval by Fry L.J. in *In re Lucas*. (2) True it is that the majority of the Court of Appeal in that case came to a different decision, but *In re Lucas* (2) differed from the present case in being a bequest of arrears of rent by a landlord to a tenant, instead of by a tenant for life to the person next entitled to the freehold. Moreover the case of *Stapleton* v. *Stapleton* (3) does not appear to have been cited to the Court. On the true construction of this will the language the testatrix has used is wide enough to include, and does include, all rent up to the death as apportioned under the Act.

On the next question I am of opinion that arrears of tithe rent-charge up to the death are included in the bequest.

Then there is the question whether any outgoings are to be charged against these arrears of rent. Reference has been made to the case of *In re Duke of Cleveland's Estate* (4), where it was held on appeal that the outgoings properly chargeable against the arrears and proportions of rent included all such expenses due and remaining unpaid at the testator's death as, in the ordinary course of management as carried on by him, would, at his death, come into charge against such arrears and proportions. That would seem a very reasonable and proper course to apply in this

(1) L. R. 19 Eq. 271, 273.
(2) 54 L. T. 30.
(3) 2 Sim. (N.S.) 212.
(4) [1894] 1 Ch. 164.

case if there had been words similar to those in the Duke's will, but there is nothing of the sort. The direction following the bequest of arrears by the Duke was "but so nevertheless that all outgoings of the said hereditaments properly chargeable against such arrears and proportions and not discharged in my lifetime shall be paid out of such arrears and proportions." Here there is nothing beyond the bequest of arrears, and, in my opinion, I am not entitled to say that the testatrix only intended to give the net rents, and that any outgoings ought to be deducted. Sir Lewis Molesworth takes the arrears of rent without deductions and as a specific bequest.

Solicitors: *Walker, Martineau & Co.; Hunter & Haynes.*

J. R. B.

Followed. In re D'AVIGDOR-GOLDSMID [1951] 1 Ch. 321

In re HARTLAND.
BANKS *v.* HARTLAND.

[1910 H. 3038.]

Revenue—Estate Duty—Apportionment—Marriage Settlement—Sum secured by Covenant and Charge on Real Estate—Death of Covenantor—Incidence of Duty—Scottish Decision on similar Point—Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 14, *sub-s.* 1.

In a case arising on the construction of a statute equally applicable to England and Scotland it is the duty of an English Court of first instance to follow an unanimous decision of the Court of Session.

A sum payable to the trustees of a marriage settlement on the death of the wife's father with interim interest during his life was secured by his covenant in the settlement and by an equitable charge on real estate.

There was no money consideration for the covenant or charge, so that on the covenantor's death estate duty became payable thereon:—

Held, that s. 14, sub-s. 1, of the Finance Act, 1894, was applicable, and consequently that the settlement trustees must pay the proper rateable part of the estate duty in respect of the property comprised in their security.

Alexander's Will Trustees v. *Alexander's Settlement Trustees* 1910 S. C. 637, followed.

ORIGINATING SUMMONS.

By an ante-nuptial settlement dated January 8, 1894, and made

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between the wife's father, hereinafter called the covenantor, of the first part, the wife of the second part, the husband of the third part, and trustees of the fourth part, the covenantor covenanted with the trustees that his executors or administrators should within six calendar months after his decease pay the trustees the sum of 14,286*l.* upon the trusts for the wife, husband, and children of the marriage therein declared. He also covenanted to pay interim interest at 3½ per cent.

He also gave the trustees an equitable charge on the freehold hereditaments comprised in certain title deeds and documents specified in the first schedule, and deposited with the trustees, to secure the said sum of 14,286*l.* and interest, reserving power to substitute the title deeds and documents of other property or real securities whether freehold or leasehold (of not less than sixty years unexpired), and which property should be of the market value of 14,286*l.*, and covenanting in certain events which did not happen to give the trustees a legal mortgage on the said hereditaments. He also reserved power to pay off the 14,286*l.* in his lifetime.

The settlement contained a proviso that in case of the death of the covenantor without having paid the said sum of 14,286*l.* the trustees should not be bound in the first instance to resort to the property comprised in the deposited or substituted deeds or documents for the purpose of obtaining payment, but might either require and compel payment of the said sum of 14,286*l.* and interest by the executors or administrators of the covenantor or might sell all or any part of the said property, and in case by that sale the trustees should not realize the sum of 14,286*l.* after payment of all costs and expenses of sale they might immediately after that sale require and compel payment of any balance still remaining unsatisfied of the said sum of 14,286*l.*, and further that the trustees should not in any event be compelled or bound to value the security, nor should any act of the trustees under the settlement or in the exercise of any of the trusts thereof be deemed an election.

The marriage was solemnized on January 10, 1894. The covenantor paid interest on the 14,286*l.* during his life. He also exercised his power of substituting securities, but the

original and substituted securities were in all cases the title deeds of freehold hereditaments to which he was entitled in fee simple. No legal mortgage was ever executed.

By his will, dated December 14, 1898, the covenantor appointed the defendants (and another person who did not act or prove) his trustees and executors. He devised and bequeathed the residue of his real and personal property to his trustees upon trust for sale and conversion and directed them out of the money to arise thereby and his ready money to pay his funeral and testamentary expenses and debts and the legacies thereby bequeathed (but so that all legacies be paid primarily out of his personal estate) and to stand possessed of the residue upon the trusts therein declared.

The covenantor died on November 15, 1909. For the purposes of estate duty his net personal estate was valued at 105,000*l.* and his net real estate at 24,000*l.* (in round figures) without any deduction for the debt or charge of 14,286*l.*, this deduction being precluded by the Finance Act, 1894, s. 7, sub-s. 1, as there was no consideration in money or money's worth. The 24,000*l.* real estate included the freeholds charged by the settlement hereinafter called Estate B. This was provisionally valued at 11,775*l.* without deduction as aforesaid. Estate duty at 9 per cent. on the personal estate had been paid, and estate duty on the real estate would be payable as soon as the value was finally assessed by the commissioners.

The covenantor's executors admitted their liability to pay the 14,286*l.* to the settlement trustees, but contended that under s. 14, sub-s. 1, of the Finance Act, 1894, it must bear its own estate duty to an amount not exceeding the duty on Estate B. In other words the settlement trustees must bear the duty on the 14,286*l.*, or on the assessed value of Estate B., whichever was the smaller. By arrangement the executors paid the trustees 13,000*l.* and retained 1286*l.* to meet the estate duty in question, the payment being made and accepted without prejudice to the respective rights of the parties. The settlement trustees thereupon issued this summons to determine whether the executors were entitled to retain any part of the 14,286*l.* to meet the estate duty thereon.

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J. M. Gover, for the settlement trustees. The point depends on s. 14, sub-s. 1, of the Finance Act, 1894, but it is necessary to refer shortly to the earlier sections.

Sect. 1 imposes estate duty on all property, real or personal, passing on the death of a person dying after August 1, 1894.

Sect. 2, sub-s. 1, provides that property passing on the death of the deceased shall be deemed to include "(*a*) property of which the deceased was at the time of his death competent to dispose."

Sect. 6, sub-s. 2, provides that the executor of the deceased "shall" pay the estate duty in respect of all personal property of which the deceased was competent to dispose at his death, on delivering the Inland Revenue affidavit, and "may" pay the estate duty (*a*) in respect of any other property passing on such death, which by virtue of any testamentary disposition of the deceased is under the control of the executor, or (*b*) in the case of property not under his control, if the persons accountable for the duty request him to make that payment.

Sect. 7, sub-s. 1, provides that in determining the value of an estate for the purpose of estate duty allowance shall not be made "(*a*) for debts incurred by the deceased, or incumbrances created by a disposition made by the deceased, unless such debts or incumbrances were incurred or created bona fide for full consideration in money or money's worth wholly for the deceased's own use and benefit and take effect out of his interest."

Sect. 8, sub-s. 3, provides that the executor shall be accountable for the estate duty in respect of all personal property of which the deceased was competent to dispose at his death, but shall not be liable for any duty in excess of the assets which he has received as executor, or might but for his neglect or default have received.

Sub-s. 4 provides that where property passes on the death of the deceased, and his executor is not accountable for the estate duty in respect of that property, every person to whom any property so passes for any beneficial interest in possession, and also, "to the extent of the property actually received or disposed of by him, every trustee" shall be accountable for the estate duty on the property.

Sect. 9, sub-s. 1, provides that a rateable part of the estate duty on an estate, in proportion to the value of any property which does not pass to the executor "as such," shall be a first charge on the property in respect of which duty is leviable.

Sub-s. 4 provides that if the rateable part of the estate duty in respect of any property is paid by the executor, it shall where occasion requires be repaid to him by the trustees or owners of the property.

Sect. 14, sub-s. 1: "In the case of property which does not pass to the executor as such, an amount equal to the proper rateable part of the estate duty may be recovered by the person, who being authorized or required to pay the estate duty in respect of any property has paid such duty, from the person entitled to any sum charged on such property, (whether as capital or as an annuity or otherwise,) under a disposition not containing any express provision to the contrary."

The executors have paid the duty on the personal estate under s. 6, sub-s. 2, and as executors or devisees in trust propose to pay it on the real estate under s. 6, sub-s. 2, and s. 8, sub-s. 4. Sect. 7, sub-s. 1, prevents the 14,286*l.* being deducted as a debt, and as it is charged on Estate B. the executors contend that s. 14, sub-s. 1, applies, and that the settlement trustees ought to bear the duty on the 14,286*l.* to an amount not exceeding the duty on Estate B.

Now in the first place the settlement trustees are equitable mortgagees, i.e., they are creditors whose debt is secured both by a covenant and a charge. Duty has no doubt to be paid on their debt owing to s. 7, sub-s. 1, preventing its deduction, but there is nothing in that section to throw the duty on the creditors. Is there anything in s. 14, sub-s. 1, to throw the duty on them? The section is not intended to provide for the incidence of estate duty, but merely to protect the executor: *Wade* v. *Wade*. (1) It does not apply to covenantees without a charge although by his will the covenantor has created a mixed fund for payment of his debts: *In re Gray*. (2) It is almost inconceivable that the mere addition of a charge in aid of the covenant should throw the duty on the covenantees.

(1) [1898] 2 Ch. 276. (2) [1896] 1 Ch. 620.

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Secondly, this debt was payable out of the large personal estate which did pass to the executors as such. Its ultimate incidence as between the real and personal estate of the covenantor does not affect the covenantees, and it cannot be said against them that the debt was primarily payable out of Estate B. In the present case the debts were charged on the mixed fund and were therefore payable rateably out of the real and personal estate: *In re Spencer Cooper* (1), explaining *In re Trenchard.* (2) It follows that even if the incidence of the debt concerns the creditors at all, it was at least payable rateably out of the personal estate, and to that extent s. 14, sub-s. 1, is inapplicable.

Thirdly, the unqualified covenant to pay the 14,286*l.* coupled with the proviso as to the concurrent remedies of the covenantees against the executors and Estate B. is an express provision to the contrary within s. 14, sub-s. 1. It cannot have been intended that the covenantees should only receive 13,000*l.* An express provision to the contrary may be made without referring to the section: *In re Parker-Jervis.* (3)

Fourthly, if the section is applicable at all, it only applies to such part of the debt as is necessarily payable out of Estate B. In other words a mere charge in aid of the covenant does not bring the section into play so long as there is personal estate available. If there were no covenant, but merely a charge necessarily payable out of property not passing to the executors as such, the section would be applicable: *In re Hacket.* (4) In that case we should not be creditors at all. The Irish case of *Cope* v. *Breslin* (5) is apparently against me, but the judgment of Chatterton V.-C. is extremely short, and no reasons are given. In *Alexander's Will Trustees* v. *Alexander's Settlement Trustees* (6) the Court of Session decided that the section was applicable in a case extremely like the present. There was, however, no proviso as to concurrent remedies. In any case the decision does not bind the English Court.

Hon. Frank Russell, K.C., and *A. L. Ellis*, for the executors and devisees in trust. The joint effect of s. 7, sub-s. 1, and s. 14, sub-s. 1,

(1) [1908] 1 Ch. 130.
(2) [1905] 1 Ch. 82.
(3) [1898] 2 Ch. 643.
(4) [1907] 1 Ch. 385.
(5) [1903] 1 I. R. 418.
(6) 1910 S. C. 637.

is that for estate duty purposes, unless there is consideration in money or money's worth, covenantees with a charge on real estate are not treated as creditors at all, but as beneficiaries. That is the key to the whole position. The settlement is simply equivalent to the gift of a reversionary charge on Estate B., guaranteed by the settlor's covenant. Now that charge is primarily payable out of Estate B., which did not pass to the executors as such. As devisees in trust we are accountable for the duty under s. 8, sub-s. 4, as far as the charge can be raised out of Estate B., and as the property is under our control we can pay the duty under s. 6, sub-s. 2. But this is mere machinery. The duty has to be paid in one capacity or the other, and in all cases where duty is payable on property not passing to the executors as such the ultimate incidence is on the persons who take that property: *Berry* v. *Gaukroger*. (1) Now here the duty is payable on the charge which must be treated as a portion of Estate B., and the settlement trustees must bear the duty to an amount not exceeding the duty on Estate B. There is nothing very anomalous in this position. The devisees in trust only really get the property minus the charge. Why should they bear the duty on the charge? They have to see that the duty is paid, but that does not affect the incidence.

The proviso as to concurrent remedies merely states the ordinary rights of equitable mortgagees and is not an express provision to the contrary within s. 14, sub-s. 1. There is nothing in the section to suggest that it is only applicable so far as the charge is necessarily resorted to. *Alexander's Will Trustees* v. *Alexander's Settlement Trustees* (2) is an express decision on the exact point and ought to be followed.

J. M. Gover in reply.

Swinfen Eady J. (after stating the facts). The settlement trustees contend that they are not liable in respect of estate duty on any part of the 14,286*l.* covenanted to be paid. They say that the covenantor's personal estate is ample to satisfy the covenant, and that when they are fully paid they will give up the deeds, and that in effect they will not ultimately take the

(1) [1903] 2 Ch. 116. (2) 1910 S. C. 637.

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land comprised in the security, or be paid any part of their debt thereout. They contend that this case is not within s. 14, sub-s. 1, of the Finance Act, 1894, and, that even if it would otherwise be within that section, the proviso as to their concurrent remedies amounts to an express provision to the contrary within the meaning of s. 14, sub-s. 1.

A case has arisen in Scotland in respect of which a special case was presented to, and determined by, the Court of Session, raising the precise point which is raised by the present summons. The case is *Alexander's Will Trustees* v. *Alexander's Settlement Trustees.* (1) The facts are singularly like the facts in the present case. There was a marriage contract by which the father became liable to pay a sum of 30,000*l.*; there was an obligation to pay, and there was a charge upon certain heritable property to secure the amount; the amount was not paid in the father's lifetime, and upon his death he left, in addition to the estate that was charged with the 30,000*l.* and other property, a large sum, nearly 100,000*l.*, of personal estate, and the question which is raised by this summons was raised in the Court of Session by a special case. The case was heard before the Second Division on November 30, 1909. The reserved judgment was delivered on March 17, 1910. Lord Low and Lord Salvesen both gave judgments dealing with the very point, and the Lord Justice-Clerk concurred in the judgment of Lord Low, which he said he had had an opportunity of reading.

Where the exact point has been raised by a special case, and fully argued, and decided by an unanimous judgment of the Court of Session, and where the question is simply one that turns upon the construction of a statute which extends to Scotland as well as to England, I think my duty as a judge of first instance is to follow that decision, leaving the parties, if so advised, to have it reviewed elsewhere. I therefore merely declare that the settlement trustees are bound to pay the proper rateable part of the estate duty in respect of the property comprised in their security.

No order as to costs.

Solicitors: *Allen & Sons; Rawle, Johnstone & Co.*

(1) 1910 S. C. 637.

G. R. A.

CENTRAL LONDON RAILWAY COMPANY *v.* CITY OF LONDON LAND TAX COMMISSIONERS.

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Feb. 2, 3, 4, 15, 25.

[1910 C. 3140.]

Land Tax—Redemption—Land abutting on Highway—Exoneration ad medium filum—Presumption against—Subsequent Construction of Underground Railway—Part under Highway—Part under Land exonerated—Tolls—New Hereditament—Liability to Assessment—Land Tax Act, 1797 (38 *Geo.* 3, *c.* 5), *ss.* 4, 17—*Land Tax Redemption Act,* 1802 (42 *Geo.* 3, *c.* 116), *ss.* 8, 38.

The redemption of land tax on land in its normal condition exonerates the land a centro usque ad cælum, and the exoneration extends to any future building or works subsequently constructed under the exonerated lands.

Metropolitan Ry. Co. v. *Fowler* [1893] A. C. 416, 427; *Westminster Corporation* v. *Johnson* [1904] 2 K. B. 737, 746, 750; and *Newton, Chambers & Co.* v. *Hall* [1907] 2 K. B. 446, applied.

There is no presumption that the redemption exonerates an adjoining highway ad medium filum.

Hare v. *Putney Overseers* (1881) 7 Q. B. D. 223, 233, and *Great Eastern Ry. Co.* v. *Hackney Board of Works* (1883) 8 App. Cas. 687, 693, applied.

A railway was constructed under statutory powers partly under lands previously exonerated from land tax, partly under a highway adjoining exonerated lands. The company were empowered to charge tolls for passengers and goods:—

Held, that the portion of the railway constructed under the exonerated lands was free from land tax and that the power to charge tolls for passengers and goods was not a new and separate franchise assessable in respect of that portion.

Vauxhall Bridge Co. v. *Sawyer* (1851) 6 Ex. 504, and *Charing Cross Bridge Co.* v. *Mitchell* (1855) 4 E. & B. 549, 563, distinguished.

Held, also, that the portion of the railway under the highway was liable to land tax.

Special Case.

The plaintiffs were a company incorporated by the Central London Railway Act, 1891 (54 & 55 Vict. c. cxcvi.), and by that Act and the Central London Railway Act, 1892 (55 & 56 Vict. c. ccxli.), they were empowered to construct a railway and other works, situate partly within the city of London. The railway and certain parts of the works were situate under the surface of

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a public highway. Their construction was commenced in July, 1896, and completed in July, 1900.

The land tax on certain of the lands abutting on the highway had been redeemed and the lands exonerated therefrom before June 30, 1900, but in no case was the highway specifically included in the certificate of the contract for redemption or shewn in the plan (if any) annexed thereto. The land tax had also been redeemed on certain lands beneath which the railway and works were constructed.

The plaintiffs contended (*a*) that the redemption of the land tax and the exoneration therefrom of the lands abutting on the highway extended to the middle line of the highway; (*b*) that they were not liable to pay land tax in respect of so much of their railway and works as was situate under lands exonerated before completion of their railway and works; (*c*) that therefore they were not liable to pay land tax in respect of so much of their railway and works as was situate under the lands abutting on the highway and as extended to the middle line thereof so far as the land tax was redeemed or the said lands exonerated before completion. They asked for a declaration to this effect.

The defendants contended (*a*) that the plaintiffs were not entitled to the above declaration; (*b*) that the plaintiffs were liable to pay land tax in respect of their railway and works although the tax was redeemed before completion in respect of the lands abutting upon the highway beneath which the railway and works had been constructed; (*c*) that the plaintiffs were liable to pay land tax in respect of their railway and works although the tax was redeemed before completion in respect of the lands beneath which the railway and works had been constructed; (*d*) that the railway and works were a new hereditament, and that, no redemption of land tax having been effected in respect of that new hereditament, the plaintiffs were liable to pay land tax in respect thereof; (*e*) that the certificates of contract of redemption did not afford any evidence of a contract for the redemption of land tax in respect of the railway and works; (*f*) that there was no presumption that the redemption of land tax in respect of lands abutting upon a highway redeemed the tax on the land to the middle of the highway.

Macmorran, K.C., and *Konstam*, for the plaintiffs. The land tax is imposed and levied under the Land Tax Act, 1797, ss. 4, 17, and can be redeemed under the Land Tax Redemption Act, 1802, ss. 8, 38. The schedule to the latter Act contains a form of the certificate of the contract for redemption. [These sections and the form of certificate are substantially set out in the judgment.]

Now, although a highway in itself is of no assessable value, a railway tunnel under the highway is a hereditament prima facie assessable, and it is subject to land tax unless the site has been exonerated: *Metropolitan Ry. Co.* v. *Fowler*. (1) Similarly an underground lavatory under a highway is assessable unless the site has been exonerated: *Westminster Corporation* v. *Johnson*. (2)

When the land tax is redeemed the redemption extends to the centre of the earth, unless at the time of redemption there is a separate hereditament subject to taxation. In the latter case it is a question of intention whether the redemption extends to that separate hereditament. But underground buildings or works constructed subsequent to redemption do not attract the tax afresh: *Newton, Chambers & Co.* v. *Hall*. (3) In this case, therefore, the railway is not assessable where it is constructed under lands actually redeemed before the construction was completed.

The main part of the railway, however, is constructed under the highway, and it is necessary to shew that the highway was exonerated by the redemption of the tax on the adjoining lands. Now there is a presumption that the soil of a highway ad medium filum belongs to the owner of the adjoining land—*Doe* v. *Pearsey* (4)—and passes by a conveyance of that land although not mentioned or shewn on the plan: *Berridge* v. *Ward* (5); *Reg.* v. *Strand Board of Works* (6); *Tilbury* v. *Silva* (7); *In re White's Charities*. (8) It is submitted that this presumption applies both to the assessment and redemption of land tax and that the soil of the highway, though of no value, must be deemed to have

(1) [1893] A. C. 416, 427.
(2) [1904] 2 K. B. 737, 746, 750.
(3) [1907] 2 K. B. 446.
(4) (1827) 7 B. & C. 304.
(5) (1861) 10 C. B. (N.S.) 400.
(6) (1864) 4 B. & S. 526, 548, 551, 553.
(7) (1890) 45 Ch. D. 98.
(8) [1898] 1 Ch. 659.

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been included both in the assessment and the contract for redemption. There is no authority on the exact point, but in *Hodgson* v. *Pearson* (1), where neither the certificate of assessment nor the contract for redemption of a manor included the waste lands which were of no value, it was held they were included and exonerated and did not become subject to assessment on subsequent inclosure.

Danckwerts, K.C., *Micklem, K.C.*, and *Bremner*, for the defendants. The certificate of the contract for redemption is the proper evidence of what lands were assessed and exonerated: *Buchanan* v. *Poppleton* (2); *Hodgson* v. *Pearson.* (1) Unless they were assessed they could not be exonerated. In *Hodgson* v. *Pearson* (1) it was held that the wastes had been included in the assessment. Though then of no assessable value they were obviously capable of assessment, as they belonged to the owner of the manor beneficially.

The highway is in a different position. The certificates do not include it. There were no cellars or other buildings under it capable of being assessed, and as a highway is extra commercium and not the subject of beneficial occupation, it was presumably neither assessed nor exonerated: *Great Eastern Ry. Co.* v. *Hackney Board of Works* (3); *Hare* v. *Putney Overseers.* (4)

It is very doubtful whether the ad medium filum presumption applies to streets in a town: *Mappin Brothers* v. *Liberty & Co.* (5) But even if it applies as to ownership of the soil it does not touch the question of assessment, which depends on beneficial occupation: *Harter* v. *Salford Overseers* (6); *Winstanley* v. *North Manchester Overseers.* (7) The value of the adjoining property may be enhanced by the proximity of the highway, but that enhancement is quite independent of the ownership of the soil.

The tax is assessed on the tenant, who apart from special contract can deduct the landlord's quota from the rent: Land

(1) (1874) 31 L. T. 679.
(2) (1858) 4 C. B. (N.S.) 20, 53.
(3) 8 App. Cas. 687, 693.
(4) 7 Q. B. D. 223, 233.
(5) [1903] 1 Ch. 118, 128.
(6) (1865) 6 B. & S. 591.
(7) [1910] A. C. 7.

Tax Act, 1797, ss. 17, 35. In other words he can deduct such proportion of the tax as the rent bears to the total annual value: *Rex* v. *Inhabitants of Mitcham* (1); *Ward* v. *Const* (2); *Smith* v. *Humble*. (3) The general nature of the tax is discussed in *Reg.* v. *Land Tax Commissioners*. (4) The only appeal is to the Commissioners, and an assessment not appealed from is binding: *Simpkin* v. *Robinson* (5); but where the tax has been redeemed the Commissioners have no jurisdiction: *Charleton* v. *Alway*. (6)

Again, redemption only frees land in its natural state. It does not exonerate a new hereditament subsequently created under statutory powers: *Vauxhall Bridge Co.* v. *Sawyer* (7); *Charing Cross Bridge Co.* v. *Mitchell* (8); *New River Co.* v. *Hertford Land Tax Commissioners*. (9) In *Hodgson* v. *Pearson* (10) the waste was exonerated in its natural state. Its subsequent inclosure did not create a new hereditament. In *Newton, Chambers & Co.* v. *Hall* (11) the coal was there in its natural state and could be worked under ordinary ownership powers. In *Westminster Corporation* v. *Johnson* (12) the lavatory was an ordinary underground building and was exonerated as far as the site was exonerated. But in this case the railway is a new hereditament created by statute with a parliamentary franchise to charge tolls: Central London Railway Act, 1891, ss. 103, 104, 105. It would be quite useless without the statutory powers. It is this new statutory undertaking with its statutory franchise and source of profits that is now assessable.

Macmorran, K.C., in reply. I admit that land tax can only be redeemed on what it was assessed, and that the contract and certificate are the proper evidence of both facts. But they do not shew that the tax was not assessed on the highway. The tax is not really an occupier's tax at all. Unoccupied lands can be assessed: Land Tax Act, 1797, s. 40. The tax is payable by reason of ownership, not of occupation: *Westminster Corporation*

(1) (1783) Caldecott, 276.
(2) (1830) 10 B. & C. 635.
(3) (1854) 15 C. B. 321.
(4) (1853) 2 E. & B. 694.
(5) (1881) 45 L. T. 221.
(6) (1840) 11 Ad. & E. 993.
(7) 6 Ex. 504.
(8) 4 E. & B. 549, 563.
(9) (1857) 2 H. & N. 129, 144.
(10) 31 L. T. 679.
(11) [1907] 2 K. B. 446.
(12) [1904] 2 K. B. 737, 746, 750.

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v. *Johnson* (1); *In re Hackney and Lamberhurst Tithe Commutation Rent-charges.* (2) The Finance Act, 1896 (59 & 60 Vict. c. 28), ss. 32, 33, now provides for the "owner" redeeming and obtaining a charge. *Rex* v. *Inhabitants of Mitcham* (3) merely decided that a tenant obtained a settlement by paying the tax: see *St. George, Hanover Square (Overseers)* v. *Cambridge Union.* (4)

In the present case the adjoining owners owned the soil of the highway ad medium filum, except the part required by the local authority: *Tunbridge Wells Corporation* v. *Baird.* (5) It was not a case of "land struck with sterility" which could not be rated—*West Bromwich School Board* v. *West Bromwich Overseers* (6); *London County Council* v. *Erith Overseers* (7); *Lambeth Overseers* v. *London County Council* (the Brockwell Park case) (8)—and there is no reason for assuming that it was not included in the assessment and subsequent redemption.

Again, the construction of a railway and tunnel by a landowner under his own land, or under the half of the highway belonging to him, is ordinary user, in virtue of his proprietary rights. He does not require a parliamentary franchise for that purpose. The plaintiffs' statutory powers do not create any such franchise. The fares and rates for passengers and goods are not tolls properly so called: *Brown* v. *Great Western Ry. Co.* (9) The lavatories in *Westminster Corporation* v. *Johnson* (10) were in fact constructed under statutory powers, but were nevertheless exonerated so far as the site had been exonerated. Assuming, therefore, that the land and the part of the highway under which the railway was constructed were exonerated before its construction, that exoneration continues, and no new parliamentary franchise or hereditament has been created that is now subject to assessment.

Cur. adv. vult.

(1) [1904] 2 K. B. 737, 748.
(2) (1858) E. B. & E. 1, 47.
(3) Caldecott, 276.
(4) (1867) L. R. 3 Q. B. 1.
(5) [1896] A. C. 434.
(6) (1884) 13 Q. B. D. 929, 943.
(7) [1893] A. C. 562, 591.
(8) [1896] 2 Q. B. 25, 43; [1897] A. C. 625.
(9) (1882) 9 Q. B. D. 744.
(10) [1904] 2 K. B. 737, 746, 750.

Feb. 25. SWINFEN EADY J. This special case raises certain questions as to the liability of the plaintiffs for land tax. These questions may be summarized as follows.

The plaintiffs contend that where the land tax has been redeemed in respect of lands abutting on a highway the exoneration extends to the middle line of the highway; and also that so much of the plaintiffs' railway as is constructed below the surface of lands so exonerated is not liable to tax, on the ground that the lands are exonerated a centro usque ad cælum.

The defendants dispute the allegation that the boundary of the lands exonerated extends to the middle line of the highway; and they also contend that even if the tax has been redeemed in respect of the lands beneath which the railway has been constructed, yet the railway and works are a new hereditament, and as no redemption of land tax has been effected in respect of that new hereditament, the plaintiffs are liable to pay land tax in respect thereof.

By the Land Tax Act, 1797, s. 4, land tax is charged upon (inter alia) all manors, messuages, lands and tenements, tolls, annuities, and all other yearly profits and all hereditaments of what nature or kind soever they be, and all persons having or holding any such lands, tenements or hereditaments, or other the premises in respect thereof, are to be charged with as much equality as is possible by a pound rate towards the sums by the Act imposed.

By s. 17 of the Act the collectors may levy the sum assessed by distress and sale, and the tenants of all houses, lands, tenements and hereditaments which shall be rated by virtue of the Act are required and authorized to pay the sums rated, and to deduct out of the rent so much of the rates as the landlord should and ought to pay and bear. The sum, if any, which the landlord ought to bear will depend upon the contract between landlord and tenant.

The Land Tax Redemption Act, 1802, s. 8, provides that two Commissioners may contract for the redemption of the land tax according to the assessment and rate for the year for which such contract shall be entered into.

Sect. 38 of the same Act provides that, on payment of the

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consideration, the manors, messuages, lands, tenements, and hereditaments or other property comprised in that contract shall be wholly freed and exonerated from the land tax charged thereon, and from all further assessments thereof.

The statutory form of the certificate of the contract for the redemption of land tax certifies that the Commissioners "have contracted and agreed with for the redemption by him . . . . of land tax, being the land tax charged upon [here describe the premises as from the certificate of the Commissioners of land tax or from the schedule delivered by the party] and which premises are assessed in the assessment made for the of in the of for the year as follows, videlicet; [here insert an exact copy of such parts of the assessment as relate to the premises before described]."

The plaintiffs' argument on their first contention, that where the tax is redeemed on lands abutting on a highway the exoneration extends to the middle line of the highway, is based on the presumption that a grant of land abutting on a highway passes not only the land described by metes and bounds, but also half the soil of the road by which it is bounded. It is a well-settled rule of construction that, where there is a conveyance of land, even although it is described by reference to a plan, and by colour, and by quantity, if it is said to be bounded on one side by a public thoroughfare, then half of the road passes unless there is enough in the expressions of the instrument or in the surrounding circumstances to shew that this is not the intention of the parties: *Micklethwait* v. *Newlay Bridge Co.* (1); *Tilbury* v. *Silva* (2); *Mappin Brothers* v. *Liberty & Co.* (3)

The plaintiffs contend that the owners of land abutting on a highway or their tenants must be assumed to be in occupation of the road up to the middle of it, that in any case the land tax must be assumed to be assessed upon the whole tenement up to the middle of the road, and that when the land tax is redeemed the hereditaments thereby exonerated include the whole hereditament up to the middle of the road. It is not in dispute that the only lands exonerated by redemption are the lands on which

(1) (1886) 33 Ch. D. 133, 145. (2) 45 Ch. D. 98.
(3) [1903] 1 Ch. 118, 128.

the tax redeemed was assessed, and that the certificate of the contract is the proper evidence of what lands were assessed and are exonerated.

Specimens of the certificates of contract are set out in the schedule to the special case, one of these having a plan, but the roadway is not specifically included in any instance. Moreover, public streets cannot ordinarily be the subject of beneficial occupation for the purpose of assessment. Thus in *Hare* v. *Putney Overseers* (1) the Metropolitan Board of Works had purchased Putney Bridge, which was transferred to the board, and a statute provided that the bridge should be open free to the public, and it was held that the board had no beneficial occupation of the bridge in respect of which they were capable of being rated. Brett L.J. said: "Then comes the question, Could they [the board] be rated? They could only be rated if they were occupiers, and beneficial occupiers. . . . . They are no more occupiers of the bridge than the owner of a street is the occupier of a street after it has been dedicated to the public."

The value of property abutting on a highway may be enhanced by reason of its propinquity to the highway, but for this purpose it is immaterial in whom the soil of the highway is vested. In the language of Lord Watson (*Great Eastern Ry. Co.* v. *Hackney Board of Works* (2)), public streets have been placed extra commercium; they are subject in perpetuity to the burden of a public right which deprives the owner of their beneficial use.

In my opinion there is no ground for presuming that half the highway has been included in the assessment to land tax of the adjoining lands, or that when the tax on the adjoining lands was redeemed that redemption extended to the middle of the highway.

I am not dealing with any case which may depend on special circumstances, as, for instance, where at the time of redemption there was a cellar or other building constructed under the surface of the highway or any part of it. In my opinion the plaintiffs are liable to be assessed to the land tax in respect of such parts of the railway as are constructed under public

(1) 7 Q. B. D. 223, 233. (2) 8 App. Cas. 687, 693.

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streets or other lands in respect of which land tax has not been redeemed.

The defendants, however, further contend that even if the tax has been redeemed on the whole of the land through which the railway is made, yet they are entitled to assess the entire undertaking to land tax on the ground that it is a new source of profit. They contend that where a company is making a profit, which they describe as a profit non-natural so far as production from the soil is concerned, but arising from statutory privileges granted to the company, that constitutes a new and separate hereditament which would not be included in or exonerated by any redemption of the tax made by an ordinary owner of the land. If this argument be well founded, it would seem that every railway company and other company exercising statutory powers would be liable not only for land tax assessed upon such of their lands as are still subject to land tax, but also upon their entire undertaking as constituting a new source of yearly profit.

It is difficult to see any foundation for the argument that redemption only exonerates the land in respect of the ordinary uses to which land may be put. Moreover, it is a very ordinary use of land to build a railway upon it. In the cases of *Vauxhall Bridge Co.* v. *Sawyer* (1) and *Charing Cross Bridge Co.* v. *Mitchell* (2) it was determined that tolls form a separate tenement and hereditament distinct from the land, and that where the Legislature confers a right to take tolls a new profit and a new hereditament are created; and that as the tolls—in those cases tolls for passing over a bridge—were distinct from the land, the redemption of land tax upon the site of the bridge piers before the building of the bridge had nothing to do with the tolls, but that land tax was payable in respect of the tolls whether it was payable or not in respect of the land supporting the bridge. In the *Charing Cross Bridge Case* (2) in the Exchequer Chamber Jervis C.J. said: "The question is only confused by referring to the redemption of the land tax: it really is, Whether the tolls are part of the land or a separate franchise. I think they are a separate franchise, assessable to the land tax as a hereditament."

(1) 6 Ex. 504.

(2) 4 E. & B. 549, 563.

Tolls are mentioned in s. 4 of the Act of 1797 and are charged with land tax. In the present case the plaintiffs have not any right to tolls properly so called, but merely to certain rates and charges for the conveyance of passengers and goods.

In my opinion no new hereditament is created, no new subject of taxation arises, when a railway company is incorporated by statute and empowered to construct and operate a railway. It may acquire lands, tenements, and hereditaments for the purpose of its undertaking, and the assessment to land tax of any land subject to tax may be increased by reason of the tunnel, buildings, and works being erected on or in the land and which become part of the land. This, however, is quite a different matter from the creation of a new hereditament, taxable irrespective of whether the tax on the lands occupied has been redeemed or not. Of course the company itself is not a "tenement" or "hereditament."

The plaintiffs by their Act of 1891 (which incorporates the Lands Clauses Acts) were empowered to construct and maintain the railway, and to enter upon, take, and use such of the lands described as might be required for that purpose; and, subject to the provision against using the surface of any public street or road, they were empowered to enter upon, take, and use the subsoil and undersurface of any public road or footway shewn on the deposited plans and described in the book of reference, or so much thereof as should be necessary.

There can be no doubt, therefore, that the plaintiffs have an interest in land, and in respect thereof are chargeable with land tax. In *Metropolitan Ry. Co.* v. *Fowler* (1) the question at issue was whether the company had an easement only, which could not be made subject to the payment of land tax, or whether they had an interest in land. It was held that their tunnel was an interest in land, a hereditament, and Lord Watson said: "It was argued that the Act of 1797 applies only to the surface of land and to buildings erected upon it, and that, whenever the surface is taxed, or is exempted, as in this case, by reason of the use to which it is put, no tax is exigible in respect of buildings below the surface. I can find no solid foundation

(1) [1893] A. C. 416, 427.

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for that argument, either in principle or in the language of the Act. A construction in or below the land is as much a part of it as an erection on its surface. A cellar below a public footway is as much a tenement as the dwelling-house to which it is appurtenant; and I can see no reason for holding that, should they be severed in title, the one would not be as much a hereditament as the other. If the tax were redeemed by the owner of the land, at a time when there were no buildings upon it, I think that buildings subsequently constructed, whether above or below the surface, would be enfranchised."

He thus points out that the surface of the roadways was exempted from land tax, by reason of the use to which it was put; and that if the tax on land be redeemed, buildings subsequently constructed, whether above or below the surface, would no longer be subject to land tax, and this in a case exactly analogous to the present, where the company was formed under statutory powers to construct a railway mainly below the surface.

Again in *Westminster Corporation* v. *Johnson* (1) the Westminster Corporation, under statutory powers, had constructed sanitary conveniences under the surface; the land tax in respect of one of the houses, on the site of which the Piccadilly Circus convenience was constructed, had been redeemed long previously. This convenience produced a profit, that is, an income in excess of the expenses. It was held that the corporation were liable to be assessed to land tax in respect of these premises, except so far as they were constructed below land in respect of which the tax had been redeemed. Collins M.R. said, "if and so far as the land tax has been redeemed in respect of any part of the site, a proper allowance must, of course, be made"; and Stirling L.J. said that the site of one convenience was formerly occupied partly by street and partly by houses, and that the land tax had been redeemed in respect of one of these houses, and that it was for the Commissioners to determine whether the structure erected by the plaintiffs (so far as the site consisted of land the tax on which had not been redeemed) was or was not of nominal value merely. It is thus apparent that in the opinion of those two learned judges no land tax would be payable in

(1) [1904] 2 K. B. 737, 746, 750.

respect of a new structure below the surface where the site had previously been enfranchised.

In my judgment, where land is exonerated from land tax, at a time when it is in its ordinary normal condition as mere land, it is entirely exonerated a centro usque ad cælum, irrespective of the use to which that land may in future be put. This will not be the case where the land, at the date of redemption, is not in its ordinary normal condition, but special circumstances exist from which an intention to redeem a partial interest only can be inferred—as, for example, where the surface and open mines below are in different occupations, and are separately assessed to the tax, and the price of redemption is arrived at upon the basis of one of those assessments only. The recent case of *Newton, Chambers & Co.* v. *Hall* (1) is in accordance with the view which I have expressed.

I therefore answer the special case by determining that the plaintiffs are not liable to pay land tax in respect of so much of their railway and works as is situate under any lands, tenements, or hereditaments which had been exonerated from the land tax before the construction of the railway, but that they are liable to pay land tax in respect of so much of their railway and works as is situate under any lands, tenements, or hereditaments not so exonerated; and that where the tax has been redeemed on lands or houses abutting on a public street or highway, the exoneration does not extend to the middle line of that street or highway. The third and fourth contentions of the defendants will be negatived.

As each party has partly succeeded and partly failed, there will be no order as to costs.

Solicitors: *Ashurst, Morris, Crisp & Co.; Harratt & Pollock.*

(1) [1907] 2 K. B. 446.

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Jan. 21.

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[1909 R. 1273.]

Mortgagor and Mortgagee—Practice—Payment off of Mortgage—Duty of Mortgagee to reconvey on Payment of Principal, Interest, and Costs — Refusal of Mortgagee to execute indorsed Reconveyance in exchange for Money due—Action for Redemption—Costs of Action.

It is the duty of a mortgagee on being paid by the mortgagor the principal, interest, and costs due upon the mortgage, and contemporaneously with such payment, to hand to the mortgagor the title deeds together with a duly executed reconveyance of the mortgaged property.

Walker v. *Jones* (1866) L. R. 1 P. C. 50, 61, followed.

Where therefore a mortgagor who had given notice to the mortgagee that he would attend for that purpose made a tender of the amount due upon the mortgage and the mortgagee refused to hand over to the mortgagor then and there an indorsed reconveyance of the mortgaged property with the title deeds, and an action for redemption was subsequently brought by the mortgagor, the Court refused to allow the mortgagee interest and costs subsequent to the date of the tender and ordered him to pay the costs of the action.

Cotterell v. *Stratton* (1872) L. R. 8 Ch. 295, 302, followed.

Witness Action.

By three several mortgages dated respectively January 12, 1905, July 28, 1905, and January 24, 1907, G. H. Rourke mortgaged to Mrs. Robinson three separate properties to secure sums of 440*l*., 440*l*., and 450*l*. and interest respectively. By each of the mortgages s. 17 of the Conveyancing and Law of Property Act, 1881, was excluded.

On March 27, 1909, the mortgagee gave to the mortgagor three months' notice, expiring on June 27, 1909, to pay off the mortgages.

The money was not paid on the date fixed, but correspondence subsequently took place between the mortgagee's and the mortgagor's solicitors, in the course of which drafts of the reconveyances proposed to be executed by the mortgagee were settled in the form of reconveyances to be indorsed on the mortgages. The mortgagee's solicitor, however, refused to obtain the execution by the mortgagee of the reconveyances until after the amount due upon the mortgages had been actually

paid, or to hand over such reconveyances on payment off, or to engross such indorsed reconveyances in anticipation of payment off. He threatened that unless the amount due was paid at once he would instruct auctioneers to put up the mortgaged properties for sale by auction.

On August 12, 1909, the mortgagor's solicitor wrote to the mortgagee's solicitor that he would attend at his office on August 17 and tender the amount of the moneys due and would then require the reconveyances to be handed over completed. Accordingly on August 17 the mortgagor, with his solicitor and the manager of the bank which was prepared to lend the money to pay off the mortgages, attended at the offices of the mortgagee's solicitor in accordance with the notice given. The mortgagee herself was not present, but her solicitor produced a power of attorney authorizing him to receive the money. The mortgagor's solicitor, having obtained from the mortgagee's solicitor a statement of the sum which the mortgagee claimed to be due, and which amounted to 1349*l.* 0*s.* 5*d.*, thereupon tendered to the mortgagee's solicitor that sum in cash, and requested him to hand over in exchange the title deeds with the reconveyances duly executed. The mortgagee's solicitor stated that he had not obtained the execution of the reconveyances. The mortgagor's solicitor thereupon declined to leave the money without having the executed reconveyances. The mortgagee's solicitor then said that until actual payment was made he should not withdraw the notices of the sale by auction which he had directed. Thereupon the mortgagor commenced the present action against the mortgagee for redemption and moved for an injunction to restrain the sale.

On the hearing of the motion mutual undertakings were given and the mortgagee offered to hand over executed reconveyances upon payment of the amount claimed, and made an appointment for that purpose for August 31, 1909, when the mortgagee claimed 1361*l.* 13*s.* 11*d.* to be due and refused to complete unless that sum was paid. The mortgagor's solicitor paid that sum under protest, and the deeds and executed reconveyances were handed over. The sum so paid was made up by additions to the

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sum of 1349*l.* 0*s.* 5*d.* originally claimed and tendered of sums for further interest, auctioneers' charges, and solicitor's costs since August 17, 1909.

On September 30, 1909, the mortgagor died, and by an order dated July 14, 1910, the proceedings were ordered to be carried on by the present plaintiff, his widow and executrix.

The action now came on for trial, and the only questions for the decision of the Court were whether the defendant was entitled to retain the additional sums paid for interest, auctioneers' charges, and solicitor's costs since August 17, 1909, and whether the plaintiff or the defendant ought to bear the costs of the action.

H. Terrell, K.C., and *Wilfrid M. Hunt*, for the plaintiff. The tender made on August 17, 1909, was a valid tender, and therefore the mortgagor ceased as from that date to be liable for further interest and costs. A mortgagor is entitled contemporaneously with the payment off by him of the money due upon the mortgage to have handed to him a duly executed reconveyance of the mortgaged property: *Walker* v. *Jones*. (1) The mortgagee can have nothing but on condition of reconveying and giving up the title deeds which he has received: *Schoole* v. *Sall* (2); *Wiltshire* v. *Smith*. (3) If the mortgagee's contention that a mortgagee is not bound to hand over an executed reconveyance in exchange for the money due under the mortgage is correct, the effect will be to render transfers under the provisions of the Conveyancing and Law of Property Act, 1881, impracticable. [They also referred to *In re Wade and Thomas*. (4)]

Cave, K.C., and *W. S. Sherrington*, for the defendant. The tender made on August 17, 1909, was not a valid tender inasmuch as it was made conditionally on reconveyances being handed over to the mortgagor. A tender to be good must be unconditional. Here it was clogged with a condition which rendered it invalid: *Evans* v. *Judkins* (5); *Glasscott* v. *Day* (6); *Greenwood* v. *Sutcliffe* (7); Fisher on Mortgages, 6th ed. p. 766. The tender

(1) L. R. 1 P. C. 50, 61.
(2) (1803) 1 Sch. & Lef. 176.
(3) (1744) 3 Atk. 89.
(4) (1881) 17 Ch. D. 348.
(5) (1815) 4 Camp. 156.
(6) (1803) 5 Esp. 48.
(7) [1892] 1 Ch. 1.

in the present case was not sufficient to cover the costs of the reconveyances, which in fact had not been engrossed or executed. To prevent interest on a mortgage from running there must be a valid tender of the amount due upon it.

Where the time fixed for the repayment of the mortgage debt has passed the rule is that on payment off the mortgagor is only entitled to have his title deeds handed back to him. He is not entitled to require an immediate reconveyance of the mortgaged property. This view is supported by the form of order made in foreclosure actions. To require a mortgagee to execute a reconveyance as an escrow would be to impose a hardship upon him, as it would put it in his solicitor's power to receive the money. And, further, in the event of a reconveyance being indorsed on a mortgage deed and the mortgagor subsequently failing to pay the mortgage debt, the mortgagee upon a sale by him of the property under his power of sale would be put to the trouble and expense of satisfying the purchaser as to the appearance among the title deeds of the reconveyance to the mortgagor. *Wiltshire* v. *Smith* (1) was not a decision on the present point. *Schoole* v. *Sall* (2) did not decide that the reconveyance must be contemporaneous with the payment off of the mortgage. Of course, if the mortgagee cannot restore the estate to the mortgagor, he cannot compel payment of the mortgage debt. The statement in *Walker* v. *Jones* (3) is a mere statement that a mortgagor having paid off the amount due on his security is entitled to his property; the expression "upon payment" does not mean "at the time of payment," but within a reasonable time after. *In re Wade and Thomas* (4) merely decided that upon payment off the mortgagor is entitled to have all copies of the mortgage deed in the mortgagee's possession handed over to him. That is admitted and has never been denied by the mortgagee in this case.

As to the costs of the action, the general rule is that a mortgagee will not be deprived of his costs unless he has been guilty of such inequitable conduct as will amount to a violation or culpable neglect of his duty under the contract: *Cotterell* v.

(1) 3 Atk. 89.
(2) 1 Sch. & Lef. 176.
(3) L. R. 1 P. C. 50, 61.
(4) 17 Ch. D. 348.

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Stratton (1); *Kinnaird* v. *Trollope*. (2) The action is for redemption, and even if the Court is of opinion that the mortgagee is wrong in her contention that the tender was not sufficient to stop interest on the mortgage from running, there was no denial on her part of the mortgagor's right to redeem, and the mere fact that she has claimed more than the Court holds she is entitled to is not sufficient to deprive her of costs.

H. Terrell, K.C., was not called upon to reply.

WARRINGTON J. The question in this case resolves itself into whether the mortgagee, the defendant, was entitled to insist upon receiving the amount claimed by her for principal, interest, and costs, without at the same time executing reconveyances of the property to the mortgagor. The action is in form a redemption action, but very shortly after its commencement the principal money and interest up to the date of payment, together with certain costs incurred by the mortgagee subsequently to August 17, 1909, when a tender of principal, interest, and costs then due had been made by the mortgagor, were paid, and the only controversy between the parties now is whether the mortgagee is entitled to retain the interest subsequent to August 17, 1909, and the costs incurred by her subsequent to that date, and whether the plaintiff or the defendant ought to bear the costs of the action.

The facts are very simple. The original plaintiff, now represented by his executrix, was mortgagor under three deeds of three separate properties, but in each case s. 17 of the Conveyancing and Law of Property Act, 1881, was excluded; therefore, although the mortgages were by three deeds, in substance there was one mortgage for the three properties.

On March 27, 1909, the mortgagee gave notice to the mortgagor requiring him to pay off the mortgages in three months from that date. The notice thus expired on June 27, 1909. The money was not paid on that date, but subsequently correspondence passed between the solicitor for the mortgagor and the solicitor for the mortgagee, in the course of which the drafts of

(1) L. R. 8 Ch. 295, 302. (2) (1889) 42 Ch. D. 610, 619.

the reconveyances proposed to be executed by the mortgagee were settled. I only mention that because there is no dispute as to the form the reconveyances were to take. But the mortgagee's solicitor deliberately and, considering himself to be acting therein in the essential interest of his client, positively declined to get her to execute the reconveyances as escrows or to do anything which would ensure the delivery of executed reconveyances upon payment of the money; and I think the whole question really is whether the solicitor was justified in the position which he took up.

Now what is the contract into which a mortgagee enters? What is it that he is bound by his contract with the mortgagor to do? I think that is expressed by Turner L.J. in *Walker* v. *Jones*. (1) He says: "It is also clear that every mortgagor has the right to have a reconveyance of the mortgaged property upon payment of the money due upon the mortgage; and that every mortgagee is charged with the duty of making such reconveyance upon such payment being made. This, indeed, is no more than the necessary result of the relative positions of the parties, the mortgage being only a security for the debt." In my opinion the position which was taken up by the mortgagee through her solicitor was not in accordance with the duty of the mortgagee towards the mortgagor. This position was taken up by the mortgagee before there was any tender or offer of the mortgage money by the mortgagor.

On August 17, 1909, the mortgagor and his solicitor and the manager of the bank which was prepared to lend the money to pay off the mortgages attended at the office of the solicitor of the mortgagee, and having obtained from him a statement of the sum which the mortgagee claimed to be due, and which amounted altogether to 1349*l.* 0*s.* 5*d.*, the mortgagor's solicitor in the presence of the mortgagor placed on the table 1300*l.* in thirteen 100*l.* notes, 45*l.* in nine 5*l.* notes, 4*l.* in gold, and 5*d.* in copper, making up the total sum of 1349*l.* 0*s.* 5*d.*, and required in return for the money the delivery of the deeds together with reconveyances duly executed by the mortgagee. The deeds were there, and he could have taken them, but the

(1) L. R. 1 P. C. 50, 61.

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reconveyances were not. The mortgagee was at that time threatening to sell, and had already advertised the property for sale. The mortgagee's solicitor was asked, under the circumstances, to stay the sale, but he refused to do so.

The writ in this action was issued, and, as I have said, subsequently to the writ being issued the mortgagor, under protest, on August 31, 1909, paid not only the 1349*l.* 0*s.* 5*d.*, but a further sum, amounting to 12*l.* 13*s.* 6*d.*, which was claimed for further interest, auctioneers' charges, and costs incurred since August 17. I have already said that I think the mortgagee misconceived her engagement with the mortgagor. The engagement of a mortgagee is to give a reconveyance to the mortgagor on repayment of the money secured. The mortgagee here did not do that. I can see no reason whatever why, if she did not choose to attend and execute in her solicitor's office proper reconveyances in the form already settled, if it was more convenient for her to do it in some other way, she should not have executed reconveyances as escrows.

It has been contended that what took place on August 17 was a conditional tender and was therefore no tender at all. I doubt very much whether the technical rules relating to tender are of much importance in this case, but if they are, I should be prepared to hold that this was not a conditional tender. It was not, as in the cases which were referred to, a tender of a less sum than that which was claimed by the creditor, on condition that a discharge in full should be given for the debt, but it was a tender of all that the mortgagee claimed; all that the mortgagor asked for was that which he was entitled to have under his contract with the mortgagee. It would seem to me, therefore, if it were necessary to decide the point, that it was a perfectly good tender. But I look at it in a light which renders it unnecessary to decide that point. There was no question whatever between the parties except the one as to the reconveyances, and as to that I think the mortgagee was wrong. In my opinion, therefore, the plaintiff is entitled to recover the amount of his interest subsequent to August 17 and the amount charged for subsequent mortgagee's costs.

With regard to the costs of the action, it was laid down by Lord

Selborne L.C. in *Cotterell* v. *Stratton* (1), and cited in *Kinnaird* v. *Trollope* (2), that the rights of a mortgagee to costs, "resting substantially upon contract, can only be lost or curtailed by such inequitable conduct on the part of a mortgagee or trustee as may amount to a violation or culpable neglect of his duty under the contract." This is just one of those cases. I think the mortgagee here was guilty of a violation of her duty under the contract. The action was caused entirely by that. There would have been no action if she had been ready with the reconveyances on August 17. The costs of the action, therefore, were caused by her misconduct, and she must pay them. There must be judgment for the plaintiff for recovery of the sums and costs of the action.

Solicitors: *Mills & Morley, for R. W. Sherwin, Portsmouth; Fraser & Christian, for W. H. Bolitho, Portsea.*

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[1910 H. 1386.]

Mortgage—Mortgage by Husband and Wife of Wife's Property—Payment of Mortgage Money to Husband and Wife—Presumption—Exoneration of Wife's Property.

Where a wife concurs with her husband in mortgaging her property and it appears on the face of the mortgage deed that the money was paid to the husband, or, before 1883, to the husband and wife, the Court infers, subject to rebutting evidence, that the debt is the debt of the husband, and that the wife's property is a surety for it. By way of rebuttal it may be shewn either that the money was in fact paid to the wife in such a way as to become her separate property or that it was applied by the husband for her benefit.

Dictum of Wood V.-C. in *Hudson* v. *Carmichael* (1854) Kay, 613, 620, to the above effect followed.

The above dictum has not been affected by the dicta of Lindley M.R. in *Paget* v. *Paget* [1898] 1 Ch. 474, 475.

WITNESS ACTION.

The action was brought by the plaintiffs, Caroline Eliza Hall

(1) L. R. 8 Ch. 295, 302. (2) 42 Ch. D. 610, 619.

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and Charlotte Selina Hall, as executors and trustees of the will of Mary Jane Hall, for a declaration that in the events which had happened they were entitled to an undivided moiety of certain freehold hereditaments situate in Park Street, Walsall, in the county of Stafford, comprised in an indenture of mortgage dated November 29, 1859, and made between William Hall and his wife, Mary Jane Hall, of the one part and G. B. Stubbs of the other part, and in an indenture of further charge dated June 22, 1880, and made between William Hall and Mary Jane Hall of the one part and G. B. Stubbs and W. S. Bamber of the other part, discharged from the principal sums of 450*l.* and 550*l.* and interest thereby secured and from all claims and demands thereunder, and for incidental relief.

The defendant, William Frederick Hall, was the transferee of the above mortgage and further charge and was also the heir-at-law of William Hall, who had died intestate.

The following statement of facts, so far as material, is taken substantially from the judgment of Warrington J.

In 1855 the marriage between Mary Jane Hall, then Mary Jane Bowrin, and William Hall took place. The wife was then entitled to one undivided moiety of the property in question, her brother J. H. Bowrin being entitled to the other moiety. The wife was only eighteen at the time of her marriage and attained twenty-one in the year 1858. The husband was a saddle manufacturer, and had no money of his own beyond what he earned in his business. At the date of the agreement next mentioned the legal estate in the entirety of the property was vested in G. B. Stubbs, a mortgagee whose debt had been paid, but who had not executed a reconveyance of the property. In October, 1859, William Hall agreed with J. H. Bowrin for the purchase by him of Bowrin's moiety for the sum of 385*l.* On November 1, 1859, for the purpose of carrying that agreement into effect, Stubbs, the mortgagee, executed a reconveyance of the property to J. H. Bowrin and Mary Jane Hall as tenants in common in fee. On November 10, 1859, J. H. Bowrin conveyed his moiety to William Hall in consideration of 385*l.* expressed to be then paid to him. On November 29, 1859, the first of the mortgages in question in the action was executed. That was a

mortgage by the husband and wife in favour of Stubbs, the old mortgagee, for the sum of 450*l.*, which sum was expressed in the deed to be paid to the husband and wife, a receipt signed by the husband and wife for the money as paid to the two being indorsed on the deed. The mortgagee's bill of costs was rendered to the husband, and contained two items, one relating to the agreement of October, and the other to the reconveyance, the conveyance, and the new mortgage. There was no direct evidence of what was done with the mortgage money, nor was there any suggestion that William Hall had any money of his own wherewith to provide the 385*l.* It appeared on the face of the bill of costs that the whole of the costs were retained by Stubbs, the mortgagee, presumably out of the sum advanced. The inference from the facts was that the mortgage was the means by which the purchase was effected, and that the 385*l.*, as well as the costs, was paid out of the advance. There was evidence that at a later date some alterations and improvements were made in the property, and there could be very little doubt that they were paid for by William Hall. In 1875 the mortgage was transferred by Stubbs or his executors. On June 22, 1880, an indenture of further charge was executed in favour of the transferees for 550*l.* by the husband and wife, the money being expressed to be paid to the husband and wife, with an indorsed receipt to the same effect. Both the mortgage and further charge were duly acknowledged by the wife in accordance with the Fines and Recoveries Act. Each contained a covenant to pay as follows: "And the said William Hall doth hereby for himself his heirs executors and administrators and for the said Mary Jane Hall his wife and her heirs executors and administrators and the said Mary Jane Hall for herself separately and her own separate heirs executors and administrators in respect of her separate estate and interest in the said premises and so as to charge the same and herself her heirs executors and administrators respectively doth hereby covenant with the mortgagee" and so on. In law that covenant by the wife was no covenant at all. It was not shewn that she had any separate estate, and therefore in equity it would have no effect, and in law the covenant was a covenant by the

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husband alone for himself and his wife, that was to say, a covenant that he would pay and that his wife would pay. William Frederick Hall, the defendant, who was the son of William Hall and Mary Jane Hall, stated in evidence that on the occasion of the execution of the further charge his father and mother went together to the solicitor's office to execute the deed, that his mother told him on her return home that to his father's great annoyance the solicitor had ordered him out of the room—which he had done because it was necessary that the wife should be examined separately and apart from her husband—and further that the solicitor had insisted on handing the money, which was in notes and gold, to her; that she had put it into her bag and had left the office with it in her possession; and that, in consequence of the great annoyance expressed by the husband, she had on the way to the station to return home given it to him. The son also said that his mother told him it was a gift to her husband and that she had gone to the solicitor's office "to get the money for her husband." About that time the husband executed some improvements on the property at the cost of about 70*l.* or 80*l.*, and he subsequently effected other improvements. In 1906 the mortgagees required payment off or transfer of the mortgage and further charge, and they were accordingly transferred, the transferees insisting on the concurrence in the transfer of Mary Jane Hall and William Hall, in order that they might have their assent to the statement of account as between the mortgagors and mortgagees. The wife at first objected to concur, but ultimately consented on the husband agreeing to pay her an allowance of two guineas a week for housekeeping, instead of the 30*s.* which he had hitherto been in the habit of allowing her. On February 22, 1909, William Hall died intestate, leaving his wife surviving and several children, including the defendant, his heir-at-law. The wife, having taken out letters of administration to his estate, died on January 23, 1910. The plaintiffs were her trustees, and as trustees were devisees of her moiety of the estate; one of them, Caroline Eliza Hall, had since the death of her mother taken out letters of administration de bonis non to her father's estate. On February 21, 1910, the defendant took a transfer to himself of the mortgage

and further charge for 1000*l.*, and was, therefore, both mortgagee of the entirety and entitled in fee, subject to the mortgage and further charge, to one moiety.

T. H. Carson, K.C., and *J. F. Popham*, for the plaintiffs. The principle applicable to this case is that laid down by Wood V.-C. in *Hudson* v. *Carmichael* (1), namely, that where a wife joins with her husband in mortgaging her property and the money is paid to the husband alone, or, in the case of a transaction before 1883, to the husband and wife, in the absence of evidence that the money was applied by the husband for the benefit of the wife, the wife is regarded as a surety only for the husband's debt and is entitled to have her property exonerated by him.

[WARRINGTON J. The whole question in that case was not whether the wife was in the position of a surety, but whether she was entitled to rank with the other creditors of her husband.]

There is here no question of any competition of the wife with her husband's creditors. The payment being expressed on the face of the mortgage and further charge to have been made to the husband and wife, that in law is a payment to the husband, and the wife's property is regarded as a surety for the debt. The onus is therefore upon the husband or those claiming through him to shew affirmatively that the money was applied for the benefit of the wife: *Earl of Kinnoul* v. *Money*. (2) The mortgage debt is the debt of the husband, and the wife by consenting to charge her land with it does not make it less his debt than it was before: *Tate* v. *Austin*. (3)

Nothing that was said by Lindley M.R. in *Paget* v. *Paget* (4) has altered the law as stated by Wood V.-C. in *Hudson* v. *Carmichael* (1), at all events in the case of transactions occurring before 1883.

Then as to the suggestion that there was an intention on the part of the wife to give the money to her husband, it is no doubt open to the defendant to adduce parol evidence to prove a separate and independent transaction in which the money was given by

(1) Kay, 613, 620.
(2) (1767) 3 Swans. 202, n., 208, n.
(3) (1714) 1 P. Wms. 264; 2 Vern. 689.
(4) [1898] 1 Ch. 470, 474, 475.

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the wife to the husband; but as regards one and the same transaction parol evidence will not be admitted of a declaration by the wife that the money was intended by her as a gift to the husband contrary to the express language of the mortgage and further charge: *Clinton* v. *Hooper* (1); Coote on Mortgages, 7th ed. p. 361.

Cave, K.C., and *A. de W. Mulligan*, for the defendant. The plaintiffs' claim for exoneration of the wife's estate is made for the first time after the lapse of over fifty years from the date of the first of the two transactions in question. The wife during her lifetime never asserted any such claim, and her actions subsequently to the transactions were entirely inconsistent with the existence of any such right.

In the present day the question is not one of legal presumption, but of fact: *Paget* v. *Paget* (2); *Bagot* v. *Oughton* (3); *Lewis* v. *Nangle*. (4) The statement of Wood V.-C. in *Hudson* v. *Carmichael* (5) was a mere dictum and was not necessary for the decision of the case. It was based on an erroneous reading of *Earl of Kinnoul* v. *Money* (6) and is contrary to the Vice-Chancellor's own decision in *Thomas* v. *Thomas*. (7) The dictum stands absolutely alone and is balanced by the dictum of Lindley M.R. in *Paget* v. *Paget*. (2)

Earl of Kinnoul v. *Money* (6) is not an authority for the alleged presumption. It was there proved that the money borrowed was applied partly in payment of the husband's and partly in payment of the wife's debts. In *Clinton* v. *Hooper* (1) it appeared that the husband had received the money and had applied it solely for his own purposes.

But assuming that there is a presumption such as is alleged, it is easily rebutted by the following facts. The property was held by the husband and wife as tenants in common; the money was paid to both of them, and the receipts indorsed on the mortgage deeds were signed by both. If the wife was merely a surety it is difficult to see why the money was not paid to the

(1) (1791) 1 Ves. Jun. 173, 188.
(2) [1898] 1 Ch. 470, 474, 475.
(3) (1717) 1 P. Wms. 347.
(4) (1752) Amb. 150.
(5) Kay, 613, 620.
(6) 3 Swans. 202, n.
(7) (1855) 2 K. & J. 79.

husband alone. Further, the mortgage deeds contained no suretyship clause, and the covenants were by the husband and wife jointly and severally, so that, even if the covenant by the wife was in law bad, it at least shews that it was her intention as between herself and her husband that she should not be merely a surety. In addition the wife was separately examined before she executed the deeds and stated that she understood their effect. As regards the further charge in 1880 the evidence is that the money was given to the wife, that she took it away with her from the solicitor's office and subsequently gave it to her husband. Those circumstances support the view that the money was a gift by the wife to the husband and bring the case within *Clinton* v. *Hooper* (1), and that view is confirmed by the actions of the wife after her husband's death.

T. H. Carson, K.C., in reply.

WARRINGTON J. In 1859 one William Hall was seised of one undivided moiety of certain freehold hereditaments in his own right, and was seised of the other undivided moiety in right of his wife, Mary Jane Hall. By deeds of mortgage and further charge, duly acknowledged by the wife, the husband and wife granted the freeholds in fee to secure sums amounting together to 1000*l.* expressed to be paid to the husband and wife. They are both dead. The plaintiffs, as representatives of the wife, claim against the defendant, who is the husband's heir-at-law, and also transferee of the mortgage and further charge, a declaration which in effect is that the husband's share was primarily liable to the debt, and that, in the events which have happened, they are entitled to have the wife's moiety discharged from it, and for consequential relief.

The facts are as follows: [His Lordship stated the facts substantially as above set forth, and, after referring to further facts with reference to an alleged waiver by the wife in her lifetime and by the plaintiffs after her death of the claim to exoneration of her estate, and holding that no such waiver had been proved, continued:—]

I now come to the more difficult question and the main

(1) 1 Ves. Jun. 173.

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question in the action: Was Mary Jane Hall entitled, not to be personally exonerated,—because she was under no personal liability—but to have her moiety exonerated, so far as the other moiety was sufficient, from the charge created by those two deeds? There is one very clear statement of the law as it was conceived to be by a very learned master of equity, Sir William Page Wood V.-C., which is in terms exactly applicable to the present case. That is contained in *Hudson* v. *Carmichael.* (1) The head-note sufficiently states the facts for the purposes of the present judgment. It says: "A married woman, entitled to property under a settlement to her separate use, concurred with her husband in raising money upon mortgage of it, by a deed which expressed that the money was borrowed by and paid to herself and her husband, but contained a covenant by the husband for repayment." The facts were precisely those of the present case except that the wife was there entitled for her separate use, which was not the case here, and that the deed of mortgage in that case did not contain what in this case purported to be, though in law it was not, a covenant by the wife. The Vice-Chancellor said (2): "With regard to the position of a wife generally in respect of her property mortgaged for her husband's debt the law is clear, except in the particular case of her coming into competition with the other creditors of her husband. Whenever the wife's estate is mortgaged, and the money is paid to the husband, or to the husband and wife, which, as Lord Camden says in *Earl of Kinnoul* v. *Money* (3), is the same thing, the real question in the case is, did the husband receive the money, or was it applied to the use of the wife? If the deed expresses that it was paid to the husband and the wife, that is a payment to the husband; but it may be shewn by extrinsic evidence that the payment was in fact for the benefit of the wife. If it was not, then, the estate of the wife being a surety for the husband's debt, she has the advantage of that position as against all persons except the husband's other creditors." Those last words point to what was the real question in that suit, and it is for that reason that it is said that the statement

(1) Kay, 613. (2) Kay, 620.
(3) 3 Swans. 202, n.

thus made by Wood V.-C. was a mere dictum and was not necessary for the purposes of his decision. In terms that is true. The question in that suit was not as between the husband and wife, but as between the wife and the husband's creditors. There was no occasion in that case to dispute the contention on the part of the wife that she was entitled to have her property treated as charged by her as a surety for the husband's debt. I think Wood V.-C. intended to state that which he conceived to be the law.

That statement has been criticized in one respect. Wood V.-C. says "Whenever the wife's estate is mortgaged, and the money is paid to the husband, or to the husband and wife, which, as Lord Camden says in *Earl of Kinnoul* v. *Money* (1), is the same thing." There does not appear to be any such statement on the part of Lord Camden in *Earl of Kinnoul* v. *Money* (1), but in my judgment that is quite immaterial. I do not think Wood V.-C. was intending to base his statement on the authority of Lord Camden. He merely referred to what he supposed to be a statement of Lord Camden as confirming his own view, but in truth the payment to the husband and wife under the old law was a payment to the husband. The money in the possession of the husband, though the wife might have been partly or even wholly interested in it—the money, when paid, would belong to the husband; and it seems to me, therefore, that Wood V.-C. was plainly right in saying that in law the payment to the husband and wife was a payment to the husband, and it did not, I suppose, require the authority of Lord Camden referred to by the Vice-Chancellor.

There is one other point in that case to which I have not yet referred. The wife there was alive, and she had made an affidavit stating that her husband, being in want of money to carry on his business, had prevailed upon her to concur in executing the mortgage, that the money had been paid to him and applied by him in carrying on his business, and that no part of it had been expended in defraying any debt of the wife incurred prior to the marriage. She went on to say that she was told by her husband and his solicitors, at the time of the

(1) 3 Swans. 202, n.

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mortgage, that the husband would be primarily liable, and that, if her property first paid the debt, she would be entitled to have it recouped out of the property of her husband. In my opinion the Vice-Chancellor was not affected in his judgment by that statement. He did not refer to it; and I think that his view was that the case would have been exactly the same if there had been no such affidavit by the wife, and that what was required in order to alter the result was affirmative evidence that the money had been applied for the benefit of the wife. And surely this is the correct view. When a husband and wife are living together, when there are no circumstances indicating that expenditure is required for the exclusive benefit of the wife, or that there is any exclusive debt of the wife, incurred either before or subsequent to marriage, requiring to be paid, why is one to draw any other inference from the raising of money by the two and the payment of it to the husband than that it was required by the husband for some purposes of his own, purposes which may incidentally be for the benefit of the wife, but which are none the less the purposes of the husband?

That that is the proper inference to draw is, I think, confirmed by what Lord Hardwicke said in *Earl of Kinnoul* v. *Money*. (1) Lord Hardwicke, who was one of the most famous judges in equity in our history, said: "I differ entirely from the plaintiff's counsel, who say it is incumbent on the defendant to shew that the money was borrowed for the benefit of the husband; for the general rule is, that where a husband borrows money on the security of the wife's estate, as the money is under his power, it is supposed to come to his use; and this turns the proof on him to shew the contrary. This Court prima facie considers it as a pledge for the husband's debts; and his estate shall first be applied to exonerate it, unless a special case appears." That statement seems to me to be precisely that which Wood V.-C. made in *Hudson* v. *Carmichael* (2), although in different terms, and to indicate that the proper inference to draw from such facts is that which I have just stated.

Is there any authority that is contrary to the two statements of the law made in *Hudson* v. *Carmichael* (2) and *Earl of Kinnoul*

(1) 3 Swans. 202, n., 208, n. (2) Kay, 613, 620.

v. *Money* (1)? It is said that there is, and great reliance is placed on *Paget* v. *Paget* (2) in the Court of Appeal. There the wife was entitled to a large income for her separate use but was restrained from anticipation. The husband had incurred very considerable debts. The wife made an application under s. 39 of the Conveyancing and Law of Property Act, 1881, for the sanction of the Court to a charge on her income for the purpose of paying those debts. The Court had, of course, then to consider whether that was for the wife's benefit. Being of opinion that it was, orders were made on two occasions sanctioning the raising of money on the security of the wife's life interest, and the application of such money in the payment of the husband's debts. In that case the money never came into the possession of the husband at all; it was never, to use the expression of Lord Hardwicke, "under his power." It was applied under the orders of the Court directly in payment of his debts. The wife subsequently brought the action in which the judgment now relied upon was pronounced, for the purpose of having it declared that she and her estate were entitled to be indemnified by the husband against the money so raised, and it was decided that she was not so entitled. Kekewich J. in the Court of first instance (3) based his decision on the fact that she had made the application to the Court, that she had asserted that the payment was for her husband, that the Court in making the orders found that was the case, and that those facts by themselves prevented her from asserting any right against the husband by way of indemnity, that right not having been claimed and effect not having been given to it in the orders. The Court of Appeal (2) reviewed the whole of the circumstances of the case and came to the conclusion that the true result of the transaction was that the wife had made and deliberately made this provision for the husband's debts, and that there was no presumption or inference of law which could be drawn because the facts rebutted any such inference. Lindley M.R. in delivering the judgment of the Court said (4): "The authorities bearing on the subject, beginning with *Huntingdon*

(1) 3 Swans. 202, n.
(2) [1898] 1 Ch. 470.
(3) [1898] 1 Ch. 47.
(4) [1898] 1 Ch. 474, 475.

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v. *Huntingdon* (1) and coming down to *Hudson* v. *Carmichael* (2) "—*Hudson* v. *Carmichael* (2) was therefore cited and considered by the learned judge—" shew that if a married woman charges her property with money for the purpose of paying her husband's debts and the money raised by her is so applied, she is prima facie regarded in equity, and as between herself and him, as lending him and not giving him the money raised on her property, and as entitled to have her property exonerated by him from the charge she has created. This doctrine is purely equitable, and the authorities which establish it shew that it is based on an inference to be drawn from the circumstances of each particular case; the prima facie inference being in such a case as that supposed that both parties intended that the wife's assistance should be limited to the necessity of the case and should not go beyond such necessity. But even where the wife charges her property with money to pay her husband's debts incurred without reference to her there may be circumstances which prevent any inference from arising in her favour. Thus, if a settlement is made by the husband on his wife at the time she charges her estate he is regarded as purchasing her assistance; and the inference that the parties intended that the wife's property should be exonerated by the husband does not arise (see *Lewis* v. *Nangle.* (3)) *Clinton* v. *Hooper* (4) is the leading authority to shew that the doctrine in question is based on an inference to be drawn in each case from all the facts of that particular case. It was long ago settled that, although under the old law a husband became liable for the ante-nuptial debts of the wife, she had no right in equity to compel him to exonerate property of hers charged with those debts, even although he had expressly covenanted to pay them: see *Lewis* v. *Nangle* (3) and *Earl of Kinnoul* v. *Money.* (5) This shews the importance of ascertaining and not confounding the wife's debts with the husband's debts when considering such cases as those to which I am alluding. To say that in all such

(1) (1702) 2 W. & T. L. C., 6th ed. 1147.
(2) Kay, 613, 620.
(3) Amb. 150.
(4) 1 Ves. Jun. 173; 3 Bro. C. C. 201.
(5) 3 Swans. 202, n.

cases there is a presumption in favour of the wife"—he uses the expression "presumption"—"and that it is for the husband to rebut it, is, in our opinion, to go too far and to use language calculated to mislead. The circumstances of each case must all be weighed in order to see what inference ought to be drawn; and until an inference in favour of the wife arises there is no presumption for the husband to rebut. If this is forgotten, error may creep in." I think the learned Master of the Rolls in that case used the word "presumption" advisedly, and that he did not mean by the word "presumption" the same thing as he meant in the early part of his judgment, where he said that "if a married woman charges her property with money for the purpose of paying her husband's debts and the money raised by her is so applied, she is prima facie regarded in equity, and as between herself and him, as lending him and not giving him the money raised on her property, and as entitled to have her property exonerated by him from the charge she has created." I think he intended the two parts of his judgment to stand together —that if the facts are those which he stated in the early part of his judgment there is a prima facie inference to be drawn from those facts, but not a legal presumption in the strict sense, in favour of the wife, and, unlike the case of a legal presumption, you are entitled to go into all the facts of the case to see whether there is or is not that prima facie inference. I think that is all that *Paget* v. *Paget* (1) decided. The Master of the Rolls referred to *Hudson* v. *Carmichael* (2), and he purported to base the first part of his judgment upon it, and to say that he intended to overrule or to disagree with the statement made by Wood V.-C., which is the only part of *Hudson* v. *Carmichael* (2) on which he could have founded that passage of his judgment, seems to me to go far beyond that which any just interpretation of his language will permit. I think he accepted the statement in *Hudson* v. *Carmichael* (2) as an accurate statement of the law. *Clinton* v. *Hooper* (3), which was referred to by the Master of the Rolls in conjunction with *Hudson* v. *Carmichael* (2), was a case very much like the case of *Paget* v. *Paget*. (1) It was a case

(1) [1898] 1 Ch. 470.
(2) Kay, 613.
(3) 1 Ves. Jun. 173.

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where money was raised for the payment of the husband's debts, but on going into the facts of the case it was held that the prima facie inference which might have been drawn from the transaction was one which ought not to be drawn, and accordingly the decision was against the wife.

In my opinion, therefore, if there was nothing else in this case but the mere fact that the mortgage and further charge were executed by the husband and wife and that the money purported to be paid to the husband and the wife, the wife would be entitled to have her estate exonerated by the husband. Was there anything else? In regard to the original mortgage there plainly was not. On the contrary, as I have already said, I think the true result of the evidence is that money was required, and required to the extent of 450*l.*, for payment of the purchase-money of the moiety of the estate and the costs of that transaction. With regard to the further charge, so far as the application of the money is concerned, the position is the same as it is with regard to the 450*l.*, except that there is no direct evidence of any special application of the money for the benefit of the husband. But there is absolutely no evidence at all of the expenditure of any part of that money for the benefit of the wife, nor are there any circumstances shewing that it might have been so expended. I am, therefore, in the same position with reference to that as Wood V.-C. was in the case of *Hudson* v. *Carmichael* (1), except that he had a positive statement of the wife under such circumstances as I have mentioned. I think that was quite immaterial, and that the proper inference to be drawn from the absence of any affirmative evidence is that the money was not applied for the benefit of the wife.

Then it is said that, where the wife borrows money on security of her property, the facts may be such that the true inference to be drawn is that she gave it to her husband. It is quite true that may be so, but under what circumstances does the inference arise? In my opinion only if it is shewn that the money when raised became by the assent or agreement of the husband the wife's separate property. If it was the wife's separate money, there is, of course, nothing in law to prevent her giving it to

(1) Kay, 613.

her husband; and not only so, but it would require very slight evidence to justify the Court in coming to the conclusion that it was given. But in the present case the money never became the separate money of the wife. It is true she actually for a very short time handled the coin and the notes, but not with the consent of the husband. The husband was annoyed because the solicitor had given it to her, and in consequence of that annoyance on the part of the husband she abandoned to him the custody of that money. But there is no more a gift in that than there is in the fact that she concurred in raising money which was paid to him. It seems to me that the facts of this case are exactly as if the solicitor, instead of being so cautious as to insist upon paying the money to the wife, had ascertained on separate examination that she desired that the husband should receive it and had paid it to the husband. In my opinion, therefore, there is nothing in the circumstances of the present case to justify the conclusion that the wife gave this money to the husband. I have really nothing here but the facts in reference to which Wood V.-C. in *Hudson* v. *Carmichael* (1) based his statement of the law. There is no authority that I can find overruling or throwing any doubt on the accuracy of that statement, and I must give effect to the law as so laid down.

Solicitors: *Wilkinson & Son, for T. Harrison Evans, Walsall; Smiles & Co., for Enoch Evans, Walsall.*

(1) Kay, 613.

W. I. C.

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Feb. 11.

In re ROBINSON.

McLAREN *v.* PUBLIC TRUSTEE.

[1910 R. 1104.]

Limitations, Statute of—Trust Fund—Payment by Trustee to wrong Cestui que Trust—Mistake of Fact—Claim by one Cestui que Trust to recover from another Cestui que Trust—Money Demand—Lapse of Time—Limitation Act, 1623 (21 *Jac.* 1, *c.* 16).

An action brought in the Chancery Division by one cestui que trust against another cestui que trust to recover money wrongly paid by the trustee to the latter under a common mistake of fact is in the nature of a common law action for money had and received, and the Court, acting on the analogy of the Limitation Act, 1623, will hold the claim to be barred after the lapse of six years.

The case would be different if the claim were made in an action in which the Court was administering the trust estate. There, if there were assets to which the overpaid cestui que trust was entitled, the Court would adjust the accounts as between the parties entitled, and lapse of time would be no bar.

Harris v. *Harris* (No. 2) (1861) 29 Beav. 110, explained.

ACTION.

In 1675 King Charles II. granted to trustees certain fee farm and other rents in fee, and directed the trustees to stand seised of one annuity of 100*l.* a year, part of the premises, for the use and benefit of Mary Pendrell, the widow of Richard Pendrell, for her life, and after her decease for the use and benefit of the heirs of the body of Richard Pendrell. The annuity was granted by the King in recompense for services performed in furthering his escape after the battle of Worcester.

In 1856, in the events which had happened, this annuity had become vested in Robert McLaren and James Withington, the then heirs of the body of Richard Pendrell.

By deeds dated in 1856, 1857, and 1859, Robert McLaren and James Withington conveyed their respective moieties of the annuity to one George Robinson in fee simple, purporting to bar the entail.

From the date of the deeds the trustees for the time being of the annuity paid the whole of it to George Robinson, and after

his death to his son and successor in title, Walter Robinson, as assignee under the deeds.

In 1900 a question was raised whether the deeds effectually barred the entail. If they did not, the moiety of James Withington, who, as it was supposed, was dead, would not be payable to his assignee. Accordingly the trustee ceased to make any further payments of that moiety of the annuity.

An action was thereupon instituted for the purpose of determining the question, and by a judgment pronounced in 1903 it was, in effect, determined that the estate tail in the annuity was one that could not be barred and which therefore had not been barred by the deeds: see *Robinson* v. *Giffard*. (1) The result of the judgment was that the McLaren moiety of the annuity was properly payable to the assignee during the life of Robert McLaren, and the Withington moiety was not properly payable to the assignee, because, as it afterwards appeared upon inquiry, James Withington had died in 1874 leaving issue him surviving, which issue failed in 1886, and thereupon, as the result of the limitations of the annuity, the Withington moiety as from 1886 became payable to Robert McLaren. It was in fact, as above stated, paid from 1886 to 1900 to Walter Robinson. Robert McLaren was not able to establish these facts until 1909, but upon his then doing so the trustee paid him the arrears as from 1900 which he had kept in hand.

Robert McLaren died on February 11, 1910, having appointed the plaintiff, his widow, his executrix.

Walter Robinson died on February 19, 1910, having appointed the Public Trustee his executor.

This action was brought by the plaintiff claiming a declaration that all moneys paid to Walter Robinson in respect of the Withington moiety for the fourteen years from 1886 to 1900 were improperly so paid and that the same ought to have been paid to Robert McLaren; an account of such moneys; that the defendant as executor of Walter Robinson might be ordered to pay to the plaintiff what should be found due on taking such account; and, if the defendant did not admit assets, administration of Walter Robinson's estate.

(1) [1903] 1 Ch. 865.

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The principal defence relied upon by the defendant was the Statute of Limitations.

H. M. Humphry, for the plaintiff. The plaintiff is, it is submitted, entitled to recover the fourteen years' arrears of the Withington moiety of the annuity from the estate of Walter Robinson. It was not until 1909 that Robert McLaren was able to satisfy the Court that the Withington family was extinct.

[WARRINGTON J. What Statute of Limitations is it which is said to be applicable in this case?

Cave, K.C. The statute of James I., the claim being one for money had and received by one person to the use of another.]

There is no doubt that for twenty-six years the Robinsons received payments of the annuity to which they were not entitled, and for fourteen years out of those twenty-six years the payments ought to have been made to Robert McLaren. The principal point I have to meet is the statute of James I., and it is submitted on the authorities that where a trustee by mistake of law or of fact, or of both, pays money to the wrong person, the Statute of Limitations cannot be pleaded as a bar to the person entitled recovering it back from the person to whom it has been wrongly paid: *Livesey* v. *Livesey* (1); *Dibbs* v. *Goren* (2); *Harris* v. *Harris* (No. 2) (3); *In re Horne*. (4) In *Livesey* v. *Livesey* (1) restoration was ordered, but it would appear that the overpayments were made within the six years. In *Dibbs* v. *Goren* (2) the overpayments appear to have been made beyond the six years. The case, however, on which I most rely as an authority in the plaintiff's favour is *Harris* v. *Harris* (No. 2). (3)

[WARRINGTON J. Have you seen the actual decree made in that case? I should like to see whether the judge there directed the defendant to repay the money paid to him.]

The judgment in that case went on the footing that the defendant having been overpaid money must repay the money so overpaid. By the compromise it was arranged that the Consols should be replaced instead of the defendant repaying

(1) (1827) 3 Russ. 287.
(2) (1849) 11 Beav. 483.
(3) 29 Beav. 110.
(4) [1905] 1 Ch. 76.

the money, but he could not have been forced to do anything except repay the money. The case is cited in Lewin on Trusts, 12th ed. p. 415, for the proposition that "A cestui que trust may, notwithstanding the Statute of Limitations, if there has been no improper laches, recover from another cestui que trust an overpayment erroneously made to him by the trustee." See also Lightwood on Time Limit on Actions, p. 275, and Carson's Real Property Statutes, 2nd ed. p. 249.

[WARRINGTON J. I see, on looking at the actual decree in *Harris* v. *Harris* (No. 2) (1), that it was a compromise. I am certainly not going to say that that decision is not right; the only question is how far it extends. I think the ground of the decision was that the person who had received the money there was treated as having the trust fund in his possession knowing it to be such, and therefore he was a trustee. I do not think that Romilly M.R. would have ordered him to repay the money, but he declared him liable to make good a trust fund.]

Rogers v. *Ingham* (2) is distinguishable. There the plaintiff had full knowledge of the facts under which the money was paid to the cestui que trust. Here the money was not paid with such knowledge. The reasoning of that case shews that if the facts had been similar to those in this case the decision would have been the other way.

[WARRINGTON J. referred to *Brooksbank* v. *Smith.* (3)

Cave, K.C. That case was explained in *Baker* v. *Courage & Co.* (4)]

[He also referred to *Denys* v. *Shuckburgh.* (5)]

Cave, K.C., and *C. H. Sargant*, for the defendant. This is an action in the nature of an ordinary common law action to recover money paid to A. in mistake for B. as money paid to A. for the use of B., and as such the claim is barred after the lapse of six years under the statute of James I. This is not a case like *Dibbs* v. *Goren* (6), where the Court was administering a fund. In that case the Court directed an adjustment of the accounts between the beneficiaries. Neither is it a case like

(1) 29 Beav. 110.
(2) (1876) 3 Ch. D. 351.
(3) (1836) 2 Y. & C. Ex. 58.
(4) [1910] 1 K. B. 56.
(5) (1840) 4 Y. & C. Ex. 42.
(6) 11 Beav. 483.

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Brooksbank v. *Smith* (1), where the fund which had been wrongly transferred to the cestui que trust still remained in his hands with knowledge that it was a trust fund. The only other possible view is that where a trustee pays over money to the wrong beneficiary, and that beneficiary knows that it is wrongly paid to him, he may be treated as a constructive trustee of it. But in that case the knowledge of the beneficiary must be proved. Here no such knowledge is proved on the part of Walter Robinson. The moment the question was raised in 1900 whether the proper persons were being paid the trustee stopped payment. Even if Walter Robinson is to be treated as constructive trustee of the payments wrongly made to him, the case nevertheless falls within the Statute of Limitations, as that statute applies only to express trusts.

[WARRINGTON J. I do not think you will find that there is a distinction between express and constructive trustees as regards the applicability of the Statute of Limitations.

T. H. Carson, K.C., as amicus curiæ, referred to *Soar* v. *Ashwell.* (2)

WARRINGTON J. I see from that case that the person who receives money wrongfully must be treated as an express trustee.]

If Walter Robinson did not receive the money with knowledge that it was wrongly paid to him, it is difficult to see how he can be treated as a trustee of it, and it is only by so treating him that the plaintiff can get over the statute.

It is clear from the record of the decree in *Harris* v. *Harris* (No. 2) (3) that the defendant had large interests under the settlement out of which he could make good the amount of the proceeds of the Consols sold and paid to him. There was a partial impounding directed of that amount, but no personal order was made against him to pay it. The only decision there was that his interest could be impounded.

Rogers v. *Ingham* (4) is, we admit, distinguishable on the facts.

H. M. Humphry in reply.

(1) 2 Y. & C. Ex. 58.
(2) [1893] 2 Q. B. 390, 400, 405.
(3) 29 Beav. 110.
(4) 3 Ch. D. 351.

WARRINGTON J. In this case the plaintiff, as the legal personal representative of one Robert McLaren, claims to be repaid by the Public Trustee, as the legal personal representative of one Walter Robinson, certain moneys which were paid to Walter Robinson by a trustee, and which, as it now turns out, ought not to have been so paid. There are several defences to the action, and there is a counter-claim, but the only defence which it is necessary to mention is that of the Statute of Limitations. I may preface what I am about to say by this, that the claim is a mere money demand by the plaintiff against the defendant; there is no claim for the administration of any estate except that of which the defendant is a trustee—which is immaterial—nor for the execution of any trusts. The demand in substance is a pure money demand for money paid to A. B. which ought to have been paid to C. D.

Now the facts of the case are these: [His Lordship stated the facts to the effect above set forth, and continued.] The main defence, and the only one with which I propose to deal, is the Statute of Limitations. The defendant pleads the statute of James I. He says that this is in reality a common law action for money had and received by Walter Robinson to the use of the plaintiff, and as such it is barred of course by the lapse of six years under the Limitation Act, 1623. The plaintiff, on the other hand, says that this is a case in which a trust fund has been paid by mistake by the trustee to the wrong cestui que trust, and that, on the authorities on which he relies, there was not in the old Court of Chancery any bar by lapse of time to the recovery of that money, and that, accordingly, he is entitled now to recover the money so paid in this action, and that the Statute of Limitations has no application. Now which of these two contentions is right?

Prima facie the defendant's contention would appear to be right. What are the facts? A. B., who ought to have paid money to the plaintiff, has by mistake paid it to the defendant. A. B., who has paid it, could, if the mistake was a mistake of fact, recover it in an action for money had and received to his use, and that action would be barred by a lapse of six years. The present claim is not by the person who paid it, but by the person

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whose money was paid away. Whether in strictness the latter could maintain an action for money had and received may be a matter of some doubt, but he could have at all events maintained a suit in equity for it, making the trustee a party. In this case he has sued without making the trustee a party. But whether the action is treated as a strict claim in law for money had and received, or whether it is brought as a claim in equity through the medium of the trustee—in whichever way it is regarded—at first sight, inasmuch as the Court has always acted by analogy to the statute, one can see no reason why the period fixed by the statute should not bar the right of the plaintiff to recover. The plaintiff, however, says that there is a special principle of equity relating to the recovery of a trust fund by one cestui que trust from another, where it has been wrongly dealt with by the trustee. In support of that contention he cites certain cases to which I propose now to refer.

The first of the cases which the plaintiff cited is *Livesey* v. *Livesey*.(1) There an executrix had by mistake made certain payments to an annuitant before he became entitled to the annuity. The annuitant did afterwards become entitled to the annuity, and it was decided that the executrix was entitled to treat those payments as payments on account of the actual annuity, and to retain them out of future payments. Obviously that is an instance of a case in which the Court, administering an estate, adjusts the account between the several persons entitled, and it is certainly not an authority for any such wide proposition as that which is put forward by the plaintiff.

The next case is *Dibbs* v. *Goren* (2), which is of the same nature. There certain payments had been made by a trustee under an erroneous view of the effect of a will. The Court was administering the trusts of the will, and the persons to whom the payments had been made were compelled to make restitution out of other interests to which they were entitled. The case goes no further than that. The result of the decision of Lord Langdale M.R. is stated in the last paragraph of his judgment: "The plaintiff is entitled to have these sums deducted from the shares of John and his assignee, and of Henrietta and Charles,

(1) 3 Russ. 287.

(2) 11 Beav. 483, 484.

with a declaration, that, until those sums have been recouped, they form a lien on the other monies which may become due to them under the will." There, in administering the trusts, the Court, finding that the persons to whom overpayments had been made had other interests under the will, took hold of those interests to make good the overpayments. That case, again, is certainly not an authority for anything like the general proposition contended for by the plaintiff.

Another case, *Brooksbank* v. *Smith* (1), is not quite of the same nature as the two to which I have just referred, but is, again, explicable, I think, on a ground which distinguishes it from the present case. There trustees had wrongly transferred a sum of Consols to one of their cestuis que trust, to which that person was not entitled, and part of the stock so transferred still remained in his hands. A bill was filed by the trustees to make him retransfer that stock to them. Alderson B. said: "On the whole, I am satisfied that it was a mistake of fact, and the bill is to retransfer the remainder of that original stock so transferred, the fund being clearly identified, and consequently the party having a special lien upon it." Here you find a person in the possession of a trust fund which, when the bill is filed, he knows is a trust fund, and it is still in his possession; the trustees are entitled to follow it, and to say that the trust fund must be retransferred to them as the proper persons to hold it, namely, the trustees of the instrument under which the trust is created. That again is a perfectly simple case, a case decided according to well-known principles.

There is only one other case with which it is necessary for me to deal, and of which a great deal has been made. It certainly does come nearer than any of the other cases to support the general proposition to which I have referred. The case is *Harris* v. *Harris* (No. 2) (2), and it needs some careful examination. The report is a short and not very satisfactory one. There under a marriage settlement one Harris, the husband, was entitled to have transferred to him 5000*l.* Consols, part of the wife's fortune. The trustees, misconceiving the direction given to them by the settlement, paid him 5000*l.* sterling, for which

(1) 2 Y. & C. Ex. 58, 60.

(2) 29 Beav. 110.

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purpose they sold 6117*l.* Consols. (There is a misprint in the report on p. 110, 1170*l.* ought to be 1117*l.*) He accordingly wrongly received 1117*l.* Consols, or the proceeds thereof, forming part of the trust funds. That occurred in 1848. In 1860 a suit was instituted for various purposes connected with the trust. It was not simply an action to recover the money from Harris. It was a suit in equity for the execution of the trusts of the settlement, the appointment of new trustees, and for other relief of that kind. In the course of the decree Romilly M.R. declared that Harris was liable to make good the 1117*l.* Consols. I will come back to the decree directly to see exactly what the Master of the Rolls did; but I will first read what is reported as the judgment delivered in Court. "Mr. Follett and Mr. Lonsdale for Mr. Harris insisted that the claim was barred by the Statute of Limitations, for the rights of the plaintiff were only through the trustees, and that their claim was in respect of a simple contract debt for money paid under a mistake, and was barred by the statute." The Master of the Rolls answered their argument in this way: "I forbear to notice very fully the argument for the defence, except to say that I must dissent from it. It is not, in my opinion, correct to say, that you cannot recover from a person who has received a trust fund the money improperly paid him, except through the instrumentality of the trustees. And further, I dissent from the argument, that being so treated and considered as a mere simple contract debt between him and the trustees, the Statute of Limitations would apply. According to my experience, and to the practice which I have always known adopted, any member of a family who has obtained possession of a trust fund has been compelled to repay it at any distance of time, if there have been no improper laches on the part of the person who sought to recover it. There have been no improper laches in this case, and, therefore, I am of opinion that Mr. Harris is liable to repay"—and this is important—"the 1117*l.* Consols, and that this Court has power to lay hold of any interest of his in the trust funds for the purpose of enforcing that repayment."

In the first place it is to be remarked with reference to that judgment, as I have already pointed out, that the case was one

in which the Court was executing the trusts, and that the money which Harris had received was the proceeds of a trust fund which had been sold for the express purpose of making that payment—was in fact, therefore, the trust fund itself and was so treated by the Master of the Rolls. There is this further to be remarked, that the words used by the Master of the Rolls only go to this, that a member of a family—by which I take it he means one of several cestuis que trust interested under a particular trust deed or particular will—who has obtained possession of the fund may be compelled to repay it, that is to say, repay the fund, at any distance of time. He says that has been his experience. He cites no case, but that perhaps was unnecessary when a judge of such experience as Lord Romilly was saying what he did. But the fact remains that he cited no case, and—what is more to the point—the plaintiff here cited no case, where a mere money demand such as is made in the present case has been enforced in a Court of Equity after such a lapse of time that, if it were a demand at common law, it would have been barred by the statute. All that the plaintiff can say is that the words used by Lord Romilly, as reported, are sufficiently wide to cover the case of a cestui que trust who has been overpaid being ordered to repay.

I will now turn to the decree, which I sent for for the purpose of seeing whether any order was actually made by Lord Romilly for the repayment of the money which had been so wrongly paid to Harris, and I find no such order. The order, which was made on motion for a decree, is this: "His Honor doth declare that the defendant Arthur Spencer Douglas Harris is liable"—for what?—"to replace the 1117*l.* Bank Three per cent. Annuities the proceeds of sale whereof were received by him in excess of his rights under the settlement in the plaintiff's bill mentioned dated the 20th day of March, 1848, and that the interest of the said Arthur Spencer Douglas Harris under the trusts of the said settlement is liable to make good such 1117*l.* Bank 3 per cent. Annuities." That is the declaration—it is a declaration not that he is liable to pay, followed by an order to pay, but that he is liable to replace the 1117*l.* Consols, and that his interest is liable to make good such Consols. The decree then proceeds to direct certain

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transfers to be made, and goes on: "And the defendant Arthur Spencer Douglas Harris by his counsel proposing that instead of his replacing and making good the said 1117*l.* Bank Annuities he should replace and make good the trust funds comprised in the said settlement in manner hereinafter mentioned"—then it states that the Court was of opinion that such proposal was for the benefit of parties who were not sui juris—"It is ordered that the defendant Arthur Spencer Douglas Harris in lieu of replacing and making good the said 1117*l.* Bank 3 per cent. Annuities do replace and make good such amount of money, if any, as after the transfers sales and investments hereinbefore directed and the payment and investment directed by the order of the 19th day of February last shall have been respectively made would if invested in Bank 3 per cent. Annuities at the average price thereof on the 1st day of March, 1861, have purchased 10,959*l.* Bank 3 per cent. Annuities being the residue of the 18,100*l.* Bank 3 per cent. Annuities originally subject to the trusts of the said settlement." Then certain directions are given with regard to the funds, and especially the income of the funds, and then the decree proceeds: "And it is ordered that in case there shall be no deficiency in the said 10,959*l.* Bank Annuities after the said transfers sales and investments shall have been made then the whole residue of the said rents, profits and income remaining after such payments as aforesaid be paid to the said defendant Arthur Spencer Douglas Harris during his life or until the further order of this Court." If there is a deficiency, then he is to receive thereout 200*l.* a year, and the rest is to be applied in making good that deficiency, and after it has been made good, then the whole of the income is to be paid to the defendant during his life or until further order.

It is obvious, therefore, that in *Harris* v. *Harris* (No. 2) (1), though it is quite true the actual decree was to do something in lieu of what was the strict right of the parties as declared by the first part of the decree, the right was to have a specific sum of 1117*l.* Consols made good, and it was to be made good out of the other interests of Harris under the settlement. I do not think it was contemplated by any one that there should be an order

(1) 29 Beav. 110.

on him to retransfer the 1117*l.* as if it were a mere money demand.

I think cases of this kind where mistakes have been made by trustees in payment of trust funds fall under three heads. Where the Court is administering the funds and adjusting the rights of the parties between themselves in the ordinary course, if there are funds belonging to the person who has been overpaid, the Court may so adjust the rights as to rectify the overpayment. Then, again, there are cases where trust money actually remaining in the hands of the person in whose hands it has been wrongly placed may be followed. In such a case there is no difficulty at all; a person has received a trust fund, and it is still in his hands, and still impressed with a trust, and of course he holds it as trustee and is bound to transfer it to the proper person. The third class of cases is where the trust funds or the proceeds of the trust funds have been received by a person with knowledge that they are wrongly paid to him; there, even though the funds do not remain in his hands, he must at all events be treated as a constructive trustee and liable to repay the value of the trust funds wrongly paid to him. This case certainly does not fall under that class, for it cannot be contended that between 1886 and 1900 Walter Robinson knew that the moiety of the annuity was not payable to him.

The present case resolves itself into this—that although, owing to the fact that the plaintiff is not the person who paid the money, the action is one which could not have been maintained at common law, it is in substance a mere money demand to which a Court of Equity, acting by analogy to the statute, would apply the same period of limitation. I think, therefore, that the plaintiff's claim is barred by the statute, and that the action fails.

Solicitors: *Petch & Co.; W. Muskerry Tilson.*

W. I. C.

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STEPNEY SPARE MOTOR WHEEL COMPANY, LIMITED *v.* HALL.

[1910 S. 4043.]

Patent—Infringement—Specification—Amendment by Comptroller—Writ in Infringement Action issued after Application to amend but before Amendment of Specification—Amended Specification put in Evidence—Patents and Designs Act, 1907 (7 *Edw.* 7, *c.* 29), *ss.* 21, 22, 23.

Where the writ in an action for infringement of a patent is issued after the patentee has applied to the Comptroller for leave to amend his specification, and leave to amend is granted to him after the issue of the writ, the proper specification to put in evidence and to refer to at the trial as a description of the invention is the specification as it stands after amendment.

Action for infringement of patent.

On October 27, 1909, the plaintiffs applied to the Comptroller, under s. 21 of the Patents and Designs Act, 1907, for leave to amend their specification. The plaintiffs had threatened the present defendant, and he issued a writ in a threats action on November 30, 1909. A motion for injunction came on before the Court on December 16, and on the same day the writ in the present action was issued. On January 22, 1910, the amendment for which application had previously been made was granted. The writ in this action, therefore, was issued after the application to amend, but before the actual amendment, and a preliminary question was raised whether under those circumstances the plaintiffs were entitled to rely upon the amended specification as the document which described the invention for which the patent was granted, and which they alleged had been infringed.

T. Terrell, K.C., and *J. W. Gordon*, for the plaintiffs. The defendant insists that inasmuch as our specification was not amended until after the writ in this action was issued we cannot refer to it now, but must rely on the specification as it stood at the date when the writ was issued. Before the issue of the writ we gave notice of our application to the Comptroller for leave to amend under s. 21 of the Patents and Designs Act, 1907. The

defendant gave notice of opposition and his opposition was unsuccessful. The Comptroller gave leave to amend, and by s. 21, sub-s. 7, the amendment "shall in all Courts and for all purposes be deemed to form part of the specification." Therefore in this action we have to refer to the amended specification. The Act provides for two kinds of amendment; by the Comptroller under s. 21, sub-s. 1, who may give leave to amend "by way of disclaimer, correction, or explanation." It has been decided that an application under that sub-section is not stopped by the issue of a writ in an action for infringement. The other form of application is under s. 22 to the Court when an action for infringement of the patent or proceedings for revocation of the patent are pending. In that case by s. 21, sub-s. 8, the application cannot be made to the Comptroller, but the Court can give leave to amend by disclaimer only. The object of the Act was to make an amended specification a complete substitute for all purposes for the specification originally lodged by the patentee, and the specification as it stood before amendment can no longer be referred to: *Moser* v. *Marsden*. (1) The action is not brought on the specification, but on the patent; the specification is only the description of the invention. Our action is properly constituted, and the amended specification had to be stated in the statement of claim: *Andrew* v. *Crossley*. (2) It is true that in that case at p. 172 Lindley L.J. is reported to have said that "when you are applying for leave to amend and before you have got it, you shall not bring any action at all." But that is only dictum and it is inconsistent with the remarks of Kay L.J. in the same case.

[*A. J. Walter*, *K.C.* That sentence has been altered in the judgment of Lindley L.J. in the report of the case in the *Law Reports*, [1892] 1 Ch. 492.]

At all events it was held that s. 18, sub-s. 10, of the Act of 1883 did not apply to a person who had amended, and that the amended specification was admissible as evidence. [They also referred to Rules of the Supreme Court, 1883, Order xxiv., r. 1, and Order xxviii., r. 1.]

A. J. Walter, *K.C.*, and *J. Hunter Gray*, for the defendant.

(1) (1895) 13 Rep. Pat. Cas. 24, 31, 33. (2) (1892) 9 Rep. Pat. Cas. 165.

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We agree that it is the patent which gives the monopoly and the specification is only looked to for the description; but a right of action which arises on a non-amended specification cannot be supported by amendments introduced at a later date. When the writ was issued the only documents in existence were the patent and the unamended specification. There was no amendment on which the plaintiffs could sue. If they had amended in time they might have sued on the amended specification, subject to the provisions of s. 23 of the Act of 1907. In *Andrew* v. *Crossley* (1) the decision would have been the other way if the amendment had not in fact been already made. In the present case this point is of no practical consequence.

WARRINGTON J. stated the facts, and continued:—In the first place it is necessary to look at the provisions of the Patents and Designs Act, 1907, which refer to amendments of specifications. The first is s. 21. I will read it shortly. It provides by sub-s. 1 that an applicant or a patentee may by request in writing left at the Patent Office seek leave to amend his specification by way of disclaimer, correction, or explanation. Then there are provisions as to the mode in which that application shall be dealt with and as to appeals from the Comptroller to the law officer, and the sub-sections which are important are sub-s. 6: "No amendment shall be allowed that would make the specification, as amended, claim an invention substantially larger than, or substantially different from, the invention claimed by the specification as it stood before amendment"; sub-s. 7: "Leave to amend shall be conclusive as to the right of the party to make the amendment allowed, except in case of fraud; and the amendment shall be advertised in the prescribed manner, and shall in all Courts and for all purposes be deemed to form part of the specification"; and sub-s. 8: "This section shall not apply when and so long as any action for infringement or proceeding before the Court for the revocation of a patent is pending." Now it is conceded that in the present case s. 21 did apply, and that its application was not excluded by sub-s. 8, because at the time the application was made the action was not pending. The other

(1) [1892] 1 Ch 492; 9 Rep. Pat. Cas. 165.

provision in the Patents and Designs Act, 1907, for the amendment of specifications, s. 22, applies to the case where an action is pending, and in that case it is the Court which has power to allow an amendment, and the power of the Court is limited by the statute to an amendment by way of disclaimer. The powers of amendment are, therefore, different. The Comptroller may allow an amendment by way of disclaimer, correction, or explanation; the Court by way of disclaimer only. The only other material section is s. 23, which provides this: "Where an amendment of a specification by way of disclaimer, correction, or explanation, has been allowed under this Act, no damages shall be given in any action in respect of the use of the invention before the disclaimer, correction, or explanation, unless the patentee establishes to the satisfaction of the Court that his original claim was framed in good faith and with reasonable skill and knowledge." Now, I think that the effect of s. 23 is plainly this, that although the breach may be before the date of the amendment, the cause of action remains, notwithstanding the amendment. The cause of action is the infringement of the patent rights granted by the letters patent for a certain invention. The specification is merely a description of the invention, and all that is done by amendment is to improve, in the patentee's view, that description, and, if he so desires, to narrow the scope of his invention by disclaimer. But the invention remains there, and the invention for which the patent is granted is the invention which he describes, either by the original or by the amended specification. That that is the correct view I think is shewn quite plainly by the judgments of Lord Watson and Lord Davey, especially that of Lord Davey, in *Moser* v. *Marsden*. (1) Lord Watson says (2): "The claim of the respondent was duly amended, in conformity with the provisions of ss. 18 to 21, inclusive, of the Act of 1883 (46 & 47 Vict. c. 57). The argument against its validity was rested, in the first place, upon an alleged discrepancy between its terms and those of the original claim; and, in the second place, upon a comparison of its scope with the invention described in the body of the specification.

(1) 13 Rep. Pat. Cas. 24. (2) 13 Rep. Pat. Cas. 31.

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I am satisfied that the first of these objections is one which your Lordships are not at liberty to entertain. In my opinion, the very object of the Act of 1883 was to make an amended claim, when admitted by the proper authorities,"—that is either by the Comptroller in the one case or the Court in the other—" a complete substitute, to all effects and purposes, for the claim originally lodged by the patentee. The validity of the amended claim must, therefore, be determined in the same way, and on the same footing, as if it had formed part of the original specification; and the claim, as it stood before amendment, cannot be competently referred to, except as an aid in the construction of its language after amendment." Lord Davey says this (1): " The appellant cannot, of course, complain of any irregularity in the amendment, and no such irregularity, if there be any, will affect the validity of the patent, as by s. 18, sub-s. 9, of the Patent Act, 1883, the leave to amend is conclusive as to the right to make the amendment, and the amendment is for all purposes to be deemed to be part of the specification. We must therefore read the amended specification precisely as if it were the original one." Now I think that shews that when the amendment has been once made, the amended specification must be treated, as, in fact, the Act says it must be treated, for all purposes as the description of the invention for which the patent was granted. Provided that the proceedings for amendment are duly taken, I fail to see how it can make any difference that the writ was issued pending those proceedings. It will, of course, make a difference if the writ is issued before the proceedings for amendment, because then proceedings before the Comptroller would be improper; but assuming the proceedings before the Comptroller are proper and the amendment is properly made, then it seems to me that I must give effect to sub-s. 7 of s. 21 and treat the amended specification as the description of the invention for all purposes. Now is the case of *Andrew* v. *Crossley* (2) any authority to the contrary? I do not think it is. There are two reports of that case, one in the *Law Reports*, and the other in the Reports of Patent Cases. The point was a different one. In that case, as in the present case,

(1) 13 Rep. Pat. Cas. 33. (2) [1892] 1 Ch. 492; 9 Rep. Pat. Cas. 165.

there was an application to amend before the Comptroller, but before the writ had been issued the amendment had been sanctioned by the Comptroller though not actually made. That was the only difference between the two cases, and the point that arose there was whether under those circumstances the action was maintainable for infringement of the patent granted for the invention described in the amended specification. The decision of the Court was that it was; that the amendment must be treated as having been made before the action was commenced. That was all that the Court had to decide, but Lindley L.J. as reported in the Reports of Patent Cases said this (1): "When sub-s. 10"—that is sub-s. 10 of s. 18 of the Patents, Designs, and Trade Marks Act, 1883, which corresponds with sub-s. 8 of s. 21 of the present Act—"is looked at it is quite obvious, to my mind, what the meaning is—when you are applying for leave to amend and before you have got it, you shall not bring any action at all." Now, of course, if that was the decision of the Court, or even if it was a dictum of the learned Lord Justice, it would be difficult for me to come to the conclusion which I have come to; but, as I have said, there are two reports of the case, and in the *Law Reports* the learned Lord Justice is represented as not going nearly so far, and what he says is this (2): "When sub-s. 10 is carefully looked at, it is, to my mind, quite obvious what the meaning is—that the patentee is not to take proceedings to obtain leave to amend while an action for infringement is pending." That, of course, is a very different thing from the dictum as reported in the Reports of Patent Cases, and Kay L.J. in both the reports says what corresponds in effect with the statement of Lindley L.J. in the *Law Reports*. What Kay L.J. says is (3): "You cannot bring an action upon the patent as it was when unaltered, and then, pending that action, apply for leave to alter it without obtaining the leave of the Court under s. 19; therefore, pending such an action as that, all these provisions for applying to alter the specification and obtaining leave to amend are not to apply at all. You cannot make the application for leave to amend except by

(1) 9 Rep. Pat. Cas. 172. (2) [1892] 1 Ch. 502.
(3) [1892] 1 Ch. 504.

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leave of the Court." Now, when the judgment of Lindley L.J. in the *Law Reports* is considered it is obvious that when he revised his judgment for the purposes of those Reports he thought he had gone too far in what I must assume he said, because the Reports of Patent Cases are taken from shorthand notes. He thought he had gone a little too far in what he said at the time he delivered the judgment, and he brought his judgment, as revised for the purposes of the *Law Reports*, into agreement with that of Kay L.J. I think, therefore, there is nothing in the case of *Andrew* v. *Crossley* (1) which prevents me from arriving at the conclusion at which I have arrived, which is, that the proper specification to put in evidence and to refer to as a description of the invention is the specification as it stands now after the amendment. The defendant cannot be hurt by that, because the amendments cannot enlarge the scope of the invention; they can only either disclaim, that is to say, narrow the scope of it, or explain the description. That is all the amendments can do. Therefore I do not see how he can possibly be hurt, and moreover he is protected by s. 23, which prevents any damages being recovered in respect of what is, notwithstanding s. 23, a cause of action unless he satisfies the conditions required by that section. I think, therefore, the amended specification is the proper document to refer to.

Solicitors: *Radford & Frankland; Kenneth Brown, Baker, Baker & Co.*

(1) [1892] 1 Ch. 492; 9 Rep. Pat. Cas. 165.

H. C. R.

SHEPHERD *v.* CROFT.

PARKER J.

1910

Dec. 8, 9, 19, 20.

[1910 S. 1915.]

Vendor and Purchaser—Latent Defect in Property sold—Underground Watercourse—Specific Performance with Compensation.

Where there is a latent defect in property which is the subject of a contract of sale, but the defect is not so material as to bring the case within the principle of *Flight* v. *Booth* (1834) 1 Bing. N. C. 370, the purchaser is not entitled to have the contract rescinded, even if the defect is known to and not disclosed by the vendor.

Carlish v. *Salt* [1906] 1 Ch. 335, distinguished.

A contract was entered into for the sale of a house and lands adjoining described as a "residential property," but which in fact possessed advantages for the formation of building sites. The contract stated that the property was sold subject to all drainage, sewer, and other easements (if any) affecting the same, and (clause 11) that if any error or misstatement in the particulars or contract should be disclosed, the same should not annul the sale, nor should any compensation be claimed or made in respect thereof by either party. Neither the particulars nor contract, nor the plan annexed, disclosed or indicated the existence of a natural underground watercourse which ran through the grounds and the lands of adjoining owners in a culvert or piping constructed by the owners of the several lands. The vendors, knowing of the existence of the watercourse, did not disclose it to the purchaser, and the purchaser's agents, when inspecting the property prior to the contract, did not see the piping, although it was then exposed to view in a hole in the lawn of the house. The purchaser bought the property primarily as a residence, but with a view in certain events to using it for building purposes. In an action by the vendors for specific performance they waived clause 11 of the contract:—

Held, that the watercourse was not a sewer or drain vested in the local authority, nor an easement affecting the property, nor a defect in title, but that it was a latent defect in the property, although not of such materiality as would prevent the purchaser from getting substantially what she had contracted for if the contract was specifically enforced against her; and that the vendors were entitled to specific performance subject to their paying compensation to the purchaser for the defect by reason of the existence of the watercourse.

The executors and trustees for sale under the will of J. G. Shepherd in April, 1905, offered for sale by auction a freehold house and grounds at Bournemouth. The particulars of sale, after describing the property as "a very valuable and highly interesting freehold residential property distinguished as 'The

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Knole,' comprising an exceedingly handsome and well built Tudor mansion, occupying an elevated position facing south," gave certain particulars of the accommodation of the house, stated that the pleasure grounds, "embracing an area of about 5½ acres," possessed "extensive frontages to the Knyveton and Knole roads," and described in detail the rooms and grounds, and ended as follows: "Building advantages. The extensive road frontages which the property possesses considerably enhance its value as an investment. Reference to the annexed plan will shew that several excellent building sites could be formed, which would find a ready sale at remunerative prices."

The annexed plan did not shew or refer to an underground natural watercourse, crossing the grounds from west to east, which had been enclosed in pipes about eighteen inches in diameter which were laid at an average depth of about three feet below the surface. This drain and its history are more fully described and stated in his Lordship's judgment.

The vendors had determined to develop the property for building purposes, and had obtained the consent of the Bournemouth Corporation to a scheme including a proposed diversion of the drain or watercourse.

The conditions of sale, so far as material, were as follows:

"7. The property is sold subject to all drainage, sewer, and other easements (if any) affecting the same."

"11. If any error or misstatement in the particulars or in these conditions shall be discovered, the same shall not annul the sale, nor shall any compensation be claimed or made in respect thereof by either party."

The property was not sold at the auction, but by an agreement in writing, entered into in May, 1910, Mrs. Anne Elizabeth Croft agreed to purchase the property for 9000*l.* according to the conditions of sale so far as they applied to a sale by private treaty.

The contract fixed June 2, 1910, as the date for the completion of the purchase, and Mrs. Croft paid a deposit of 1000*l.* to the vendors.

Mrs. Croft having declined to complete the purchase on account of the existence of the drain, the vendors commenced the

present action against her, claiming (1.) a declaration that her objection was not under all the circumstances a valid objection to the title, or, alternatively, that the matter raised by the objection was subject-matter for compensation only; and (2.) specific performance of the agreement on the footing of such declaration as might be made under the first claim, and in any case on the footing that, except as to the defendant's objection, she had accepted the title.

In their statement of claim the plaintiffs alleged that the drain was used for the drainage of surface water only, and was not a public drain or under the control of the local authority, and that the suggestions of the defendant that there was any concealment of the drain from her, or that it was discovered by her after the date of the contract, were untrue. They also alleged as follows: "In the course of planning a scheme for the development of the . . property . . the plaintiffs . . in February, 1910, uncovered parts of the said drain . . and several large and conspicuous holes were left and still remain open, exposing parts of the said drain to view. The existence of the said drain, and the nature and position thereof were patent and obvious to any person inspecting the said property and were in fact well known to the defendant prior to the date of the said agreement. . . The said property was in fact inspected by the defendant and agents on her behalf, including her son Mr. Henry Page Croft, prior to the signing of the said agreement and while the said drain was or parts thereof were exposed to view as aforesaid."

The defendant by her statement of defence denied that when she signed the agreement she or any agent or person acting on her behalf had any knowledge or notice of the existence of the drain, which, she said, was a public drain or sewer, not only carrying surface water, but also connected, above the Knole, with public sewers, and in times of storm carrying the overflow from such public sewers through the Knole to the sea, and that the drain was under the control of the local authority. She also alleged that the existence of the drain was, to the plaintiffs' knowledge, a very serious obstacle to the development of the property as a building estate, and that if she had known

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of the existence of the drain she would not have signed the agreement. She counterclaimed for rescission of the agreement and repayment of her deposit.

The action was tried by Parker J. with witnesses on December 8, 9, 19, 20, 1910.

A. Grant, K.C., and *Sargant*, for the plaintiffs. Covering over a watercourse does not, per se, make it a sewer: *West Riding of Yorkshire Rivers Board* v. *Gaunt & Sons* (1); and a stream which is supplied by land drainage is not a sewer although in its passage it receives the drainage of houses: *Reg.* v. *Godmanchester Local Board.* (2) The drain does not prejudice the value of the property as a residential one, and the defendant purchased the property primarily for residential purposes, although she may have had some regard to its value as being suitable for building sites. The defect, if any, was a patent defect, a fact which is sufficient to distinguish the present case from *In re Puckett and Smith's Contract.* (3) Any person making a reasonable inspection of the property, especially if he had developments for building in his mind, must have found out the existence of the drain, and the defendant's agents or agent when going over the property must have seen the pipes through the holes.

If the defect was latent, sufficient notice of it was given by the conditions of sale.

If the defendant really purchased with a view to developing the property as a building estate, the plaintiffs can at a small cost divert the drain. They will not insist on condition 11 if the Court is of opinion that compensation should be paid, and at the outside the matter is only one for compensation: *In re Brewer and Hankins's Contract.* (4)

Romer, K.C., and *W. Scott Thompson*, for the defendant. If the agreement is enforced against the defendant, she will be getting something for which she did not contract. The existence of the drain is a serious latent defect which the plaintiffs ought to have disclosed: Webster's Particulars and Conditions of Sale,

(1) (1902) 19 Times L. R. 140.
(2) (1866) L. R. 1 Q. B. 328.
(3) [1902] 2 Ch. 258.
(4) (1899) 80 L. T. 127.

3rd ed. p. 31; Williams on Vendor and Purchaser, p. 682; Fry on Specific Performance, 4th ed. p. 307. The case is governed by *Flight* v. *Booth* (1) and *In re Puckett and Smith's Contract* (2) even although the defendant did not buy with the intention of immediately using the property for building purposes. The defendant would not have purchased the property if she had known all the facts, and she is entitled to rescission of the contract—*Jacobs* v. *Revell* (3)—and need not take the property with compensation: *Carlish* v. *Salt* (4); *Horsfall* v. *Thomas.* (5)

The drain is a sewer within the meaning of the Public Health Act, 1875: *Wilkinson* v. *Llandaff and Dinas Powis Rural Council.* (6) As the drain was not made for the profit of the person who constructed it, it is vested in the local authority: *Sykes* v. *Sowerby Urban Council.* (7)

A. Grant, K.C., in reply, referred to *Hope* v. *Walter* (8); *Greenhalgh* v. *Brindley.* (9)

PARKER J. This is a vendors' action for specific performance, and it is defended by the purchaser on the grounds of (1.) misrepresentation—this defence has been abandoned in the course of the trial—and (2.) that there existed in the property a latent defect such as to bring the case within the decision in *Flight* v. *Booth.* (1) [His Lordship referred to the unsuccessful auction in 1905, and read the description of the property in the particulars of sale, and continued as follows:]

Now that appears to me to be an offer of the property for sale as a residential property having certain building advantages which are specified in the particulars. The property did not sell at the auction held in April, 1905. It has apparently remained unlet to the present time. In 1909 the vendors were proposing to develop the land for building purposes and sell it in lots, inasmuch as they had failed to sell it as a whole. Early in 1910, the defendant, who is the mother of the member of Parliament for the borough of Christchurch, in which

(1) 1 Bing. N. C. 370.
(2) [1902] 2 Ch. 258.
(3) [1900] 2 Ch. 858.
(4) [1906] 1 Ch. 335.
(5) (1862) 1 H. & C. 90.
(6) [1903] 2 Ch. 695.
(7) [1900] 1 Q. B. 584.
(8) [1900] 1 Ch. 257.
(9) [1901] 2 Ch. 324.

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Bournemouth is included, was staying at Bournemouth, and saw a poster on the property which stated that it was for sale in lots. She was at the time proposing to take a house in Bournemouth in which her son could stay with her when he was visiting the constituency. She inspected the property, and obtained from the agents the printed particulars and conditions to which I have referred. Inasmuch, however, as a seat in Parliament is an uncertain thing, and if her son were to lose his seat she would desire no longer to stay at Bournemouth, it was a matter of importance to her to consider whether the circumstances were such that she could easily dispose of the property if she had to do so; and in this connection she appears to have been attracted by the statement in the particulars as to the building advantages of the property. Ultimately she agreed to purchase the property for 9000*l.*, and on May 2, 1910, she signed a contract which incorporated the particulars and conditions so far as the latter were applicable to a sale by private treaty.

Now it appears that the Knole was formerly intersected by a natural watercourse which originated in and took the water from the hills above, and, after leaving the Knole property, found its way to the sea below. This watercourse used to supply an ornamental pond on the Knole property, but the pond was many years ago filled up, and the watercourse itself was culverted or piped by a former owner for his own convenience. Similarly, it appears that the owners of the various properties through which the watercourse passes have from time to time culverted or piped it within the limits of their own properties, and the result is that at the present time from its source to the sea it is culverted or piped. It takes the surface water from various roads and streets within the district of the Bournemouth Corporation; but it does not appear to be in any way connected with the sewage system, except that in one place, some six years ago, the corporation connected a storm overflow from a manhole in one of their sewers with a road gully which empties into this drain or watercourse. I do not know by what right the corporation did this, for, in spite of the wide definition of "sewer" and "drain" in the Public Health Act, 1875, I am of opinion that the mere fact that a natural watercourse is culverted

or piped by the several owners of the lands which are intersected by it does not make it a drain or sewer so as to vest it in the local authority under the Act. Further, the corporation had, shortly before the contract, denied their liability for the repair of the pipes on the Knole property, and they would clearly have been liable for such repair had the pipes been those of a drain vested in them under the Public Health Act, 1875. The plaintiffs had at one time considered the desirability of reopening the watercourse on the Knole property and improving it by again making an ornamental pond for lilies; but the plan had been abandoned when they determined to develop the property for building purposes, and they had obtained the consent of the corporation to a development scheme which involved not only the laying out of roads and sewers, but also a diversion of the watercourse in question. This consent, however, was given subject to the pipes for the diverted watercourse being of a certain diameter. In these circumstances I find it impossible to hold that the watercourse is an easement affecting the Knole property, or that the plaintiffs omitted to inform the defendant of the existence of such an easement, they being themselves aware of its existence. It appears to me, therefore, that the seventh of the conditions of sale, which says that "the property is sold subject to all drainage, sewer, and other easements affecting the same," has no application to the present case.

It is, however, suggested by the defendant that, even granting this, the existence of the underground watercourse is a latent defect in the property of such a nature as to bring the case within the decision in *Flight* v. *Booth* (1), and, therefore, that I ought not only to refuse specific performance of the contract, but to grant the prayer of the counter-claim by ordering the contract to be rescinded. In order to see whether the case is within *Flight* v. *Booth* (1), I have to ask myself whether, if specific performance were granted, the defendant would be getting something different from that which the plaintiffs contracted to give her. If this be so, then, according to *Flight* v. *Booth* (1), notwithstanding clause 11 of the conditions, the defendant will have

(1) 1 Bing. N. C. 370.

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the right to rescind the contract. If, however, on the other hand, the defendant, if I were to decree specific performance, would be getting substantially what the plaintiffs contracted to give her, then *Flight* v. *Booth* (1) would have no application at all. For the purpose of answering the question, it appears to me that I am bound to consider the terms of the contract itself, and if the defendant purchased for any particular purpose which was known to the plaintiffs, I have to consider the purpose for which she purchased the property. Now it appears to me, on looking at the conditions of sale and the particulars, that what the defendant was purchasing and the vendors were offering was a residential property, with certain specified building advantages; and, in my opinion, notwithstanding the existence of the underground watercourse, if I were to decree specific performance, the defendant would substantially be getting what the plaintiffs contracted to give her. She would be getting a desirable residential property with certain building advantages, those advantages being the frontage to certain roads and the possibility of a portion of the property developing into several building sites, which might be utilized and sold separately without depreciating to any undue extent the value of the house itself. With regard to the purpose for which the house and land were bought by the defendant, it appears to me that if she had any intention of using it in a way which is not disclosed by the particulars, that intention was not known to the plaintiffs; and therefore it is immaterial for the purpose which I am now considering. In my opinion, therefore, this is a case which is not within *Flight* v. *Booth* (1), but is analogous to *In re Brewer and Hankins's Contract* (2), rather than to *In re Puckett and Smith's Contract.* (3)

The plaintiffs argue that the existence of the underground watercourse is not a latent defect at all, on the ground that at and for some time before the time of the contract, and particularly when the defendant inspected the property, or it was inspected on her behalf, the piping and drain had been exposed by the digging of a hole in the lawn near one of the paths, and that

(1) 1 Bing. N. C. 370. (2) 80 L. T. 127.
(3) [1902] 2 Ch. 258.

any ordinary person, exercising reasonable care, who passed over the paths, must have seen it, and therefore that it was patent and not latent. I cannot accept that argument. I do not think that any one who inspects a property with a view to its purchase can reasonably be expected to look into every hole which the gardener has made in the lawn, even if he notices the existence of such a hole at all. In my opinion, the defect was latent, though it was not such a material defect as to bring the case within *Flight* v. *Booth*. (1) There may, however, be latent defects which, though not such as to give in equity the right to rescission, may yet affect the value of the property, and, in my opinion, the value of the Knole property is to some extent affected by the existence of the watercourse in question. In considering its value the building element cannot, in my opinion, be ignored; and if the land is to be developed advantageously for building purposes, it appears to me that the watercourse will have to be diverted at a cost of approximately 300*l*. Further, the evidence before me is that, even after diversion, the existence of the watercourse will to some extent affect the value of the building plots in which it is proposed to lay out the property, and the figure given with regard to that is, in the case of one of the experts who were called, 270*l*., on the footing, of course, that this is a natural watercourse and not a sewer. In the case of the other expert the figure is 340*l*.

In an ordinary case this would, in my opinion, give rise to a claim for compensation on the part of the purchaser; but in the present case the eleventh condition of sale appears to preclude the purchaser from asking for compensation, and might possibly have been relied on by the vendors as a reason why specific performance should be granted without compensation. I need not, however, consider the effect of this condition, because the parties, in the course of the trial, have agreed that if I am of opinion—which I am—that compensation would be payable in an ordinary case were there no conditions, then for the purposes of this action I am to treat condition 11 as struck out of the conditions of sale. That being the case, it appears to me that the proper order to make is a decree for specific performance

(1) 1 Bing. N. C. 370.

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with a reduction of the purchase-money, which, having considered the evidence, I fix at 600*l*. With regard to the counterclaim I give no relief at all.

I ought to mention one point, which was suggested in the course of the argument, that the vendors' knowledge of the existence of this watercourse was a material fact to be considered; and in this connection counsel for the defendant referred to *Horsfall* v. *Thomas* (1) and *Carlish* v. *Salt*. (2) In the former case the purchaser had ordered an experimental heavy gun to be used as a test of his system; but the plaintiffs had knowingly supplied him with a defective gun which in fact burst after firing fifteen trial rounds at different times. The gun was accepted by the purchaser (so far as concerned that defect) without examination, and in those circumstances it was held that the vendor was not guilty of fraud. It is true that the vendor had taken some means to conceal the defect; but, inasmuch as the purchaser had not made any examination of the defective part, he was not misled by any act of the vendor. It was, however, stated in the course of the case that the vendor of an article is under a duty to disclose to the purchaser any latent defect of which he is aware. In *Carlish* v. *Salt* (2) the vendor did not disclose an incumbrance of which he was fully aware, and which he must have known would affect the value of the property in the eyes of the purchaser; and in this case again it was said that the vendor was under a duty to disclose to the purchaser all latent defects of which he was aware. In neither case was it suggested that a defect which, if unknown, would not have brought the case within *Flight* v. *Booth* (3), brought it within *Flight* v. *Booth* (3) because it was known; and I do not myself quite see how that could be maintained. The defect in the present case is not a defect in title, and I hold that it is not a defect within *Flight* v. *Booth*. (3) I have no reason to think that the plaintiffs refrained from mentioning the defect because they thought it would be an

(1) 1 H. & C. 90. [The action was by the vendors on a bill of exchange given for the price: the dissent expressed by Cockburn C.J. in *Smith* v. *Hughes* (1871) L. R. 6 Q. B. at p. 605 is not believed to have been followed, or to have commanded the assent of the profession.—F. P.]

(2) [1906] 1 Ch. 335.

(3) 1 Bing. N. C. 370.

objection in the eyes of the purchaser. In my opinion, selling, as they were, primarily for residential purposes, it did not occur to them that the defect was a very material one. In these circumstances the knowledge of it, if it be of any importance at all, appears to me to be important only in considering whether the vendors ought in equity to be allowed to rely on the eleventh condition; and, as that has been waived, it appears to me that their knowledge is immaterial. If I were to hold that the knowledge of a defect of this kind, not within *Flight* v. *Booth* (1), was a fatal objection to specific performance and implied a right in the purchaser to rescind, I should in effect be treating it as equivalent to a misrepresentation of fact where the vendor knew that what was being stated was untrue; and it would follow that no compensation could be given in a Court of Equity for any defect, however trifling, if at the time of the sale the vendor was aware of the defect. I do not think that is the law.

With regard to the costs, which are the only part of the case I have now to dispose of, it appears to me that the plaintiffs ought to have their costs except in so far as they have been increased by the issues as to whether the watercourse was a latent or a patent defect, and whether the defendant knew of it; and the defendant in a similar way ought to have her costs so far as they have been increased by those issues, with the usual set-off. With regard to the counter-claim, I dismiss it with costs.

Solicitors for plaintiffs: *Parker & Thomas.*

Solicitors for defendant: *Williamson, Hill & Co., for D'Angibau & Malim, Boscombe.*

(1) 1 Bing. N. C. 370.

F. E.

PARKER J.

1911

March 3, 7.

In re ODDY.

[1910 O. 1335.]

Trustee—Public Trustee—Audit of Trust Accounts—Appeal from Direction as to Costs—Public Trustee Act, 1906 (6 *Edw.* 7, *c.* 55), *ss.* 10, 13.

Where the Public Trustee directs that the costs of an audit of trust accounts under s. 13 of the Public Trustee Act, 1906, shall be paid otherwise than out of the trust estate, the person ordered to pay the costs can appeal to the Court, under s. 10 of the Act, from his decision.

Sect. 10 of the Act applies to all decisions of the Public Trustee in discharge of his judicial functions under the Act.

Before making an order for payment of the costs of an audit under s. 13 of the Act otherwise than out of the trust estate the Public Trustee should hear the parties if they desire to be heard.

The Public Trustee ought not to be joined as a party to proceedings by way of appeal from his decision in discharge of his judicial functions.

Quære, whether an appeal does not lie from every act or omission of the Public Trustee in the performance of his administrative functions under the Act.

Sam Oddy, who died September 18, 1876, by his will gave and devised his real and personal estate to certain trustees (the survivor of whom died in 1908) on trust for sale and conversion and reinvestment of the proceeds, and he directed that after the death of his wife (who died in 1892) his trustees should stand possessed of his estate upon trust for his four daughters, Sarah Connell, Elizabeth Oddy, Harriet White, and Margaret Holgate, in equal shares, and to pay the income of their respective shares to them respectively during their respective lives, and after the death of each such daughter, in trust, as to her share, for such of her children who should attain the age of twenty-one years, or being females marry under that age, if more than one equally; and the testator declared that if there should be no child of such daughter who should attain a vested interest, such daughter's original or any accrued share should accrue to his other children living at his death equally.

All the four daughters survived the testator, but Harriet White died in 1894 and Margaret Holgate in 1901, each of them leaving children who attained vested interests in her share. On the

death of Margaret Holgate the trustees paid and distributed the shares of Harriet White and Margaret Holgate amongst their children, but the other two shares were undistributed and were in the hands of Sam Oddy, who was appointed a trustee of the will in 1908, and had since July, 1908, been the sole trustee thereof.

Sarah Swabey, Jane McGhee, and Mary Connell were daughters of the testator's daughter Sarah Connell, and on their application the Public Trustee in 1908, under the powers vested in him by the Public Trustee Act, 1906 (1), appointed an auditor to make an investigation and audit of the condition and accounts of the trust. The auditor made the report and signed the certificate required by the Act to be made and signed by him upon the completion of the investigation and audit. The report disclosed that there had been some irregularities in the trust prior to the time when Sam Oddy, the surviving trustee, was appointed, and on June 5, 1909, the Public Trustee by order under his hand directed that the sum of 140*l*., being the amount of the remuneration of the auditor and the other expenses of the investigation and audit, should be borne by the persons who had applied for the investigation and audit. The Public Trustee did not hear the parties before coming to this decision.

(1) 6 Edw. 7, c. 55, s. 13 :

"(1.) Subject to rules under this Act and unless the Court otherwise orders, the condition and accounts of any trust shall, on an application being made and notice thereof given in the prescribed manner by any trustee or beneficiary, be investigated and audited by such solicitor or public accountant as may be agreed on by the applicant and the trustees or, in default of agreement, by the Public Trustee or some person appointed by him : Provided that (except with the leave of the Court) such an investigation or audit shall not be required within twelve months after any such previous investigation or audit, and that a trustee or beneficiary shall not be appointed under this section to make an investigation or audit."

"(5.) The remuneration of the auditor and the other expenses of the investigation and audit shall be such as may be prescribed by rules under this Act, and shall, unless the Public Trustee otherwise directs, be borne by the estate; and, in the event of the Public Trustee so directing, he may order that such expenses be borne by the applicant or by the trustees personally or partly by them and partly by the applicant."

"(7.) Subject to rules of Court, applications under or for the purposes of this section to the High Court shall be made to a judge of the Chancery Division in chambers."

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Certain proceedings were then taken in respect of the irregularities above mentioned which resulted in a sum of about 155*l.* being recovered for the trust estate from the executors of a deceased trustee of the will.

The applicants for the audit, Sarah Swabey, Jane McGhee, and Mary Connell, took out an originating summons, intituled in the matter of the estate of the testator and his will, and "In the matter of the Public Trustee Act, 1906," against Sam Oddy, the sole trustee, Sarah Connell and Elizabeth Oddy (tenants for life), and James Connell and Sam Connell (persons entitled in remainder to part of the estate), asking that the sum of 140*l.*, the amount of such costs as above mentioned, might be ordered to be paid by Sam Oddy personally, or, alternatively, that the same might be ordered to be borne by and paid out of the trust estate, and that in the latter event directions might be given as to the raising and paying of the 140*l.*

The summons was adjourned into Court and heard by Parker J. on March 3 and 7, 1911.

The following extract from a letter of Mr. C. J. Stewart, the Public Trustee, was read at the hearing:—"As a general rule, I always hear the parties, but, having regard to the provisions of s. 13 (2.) of the Act, which provides that the auditor shall sign a certificate to the effect that the accounts exhibit a true view of the state of the affairs of the trust, I have considered up to the present that I have been bound by the auditor's report in so far as it purports to make statements of fact as distinguished from expressions of opinion. Hence, whenever the parties have not questioned the accuracy of the report, but have confined their criticisms to its consequences, I have not considered that any useful purpose would be served by having them before me. It may be that this practice is wrong, and, if so, I think that if my general practice is stated to the Court, it is possible that some general indications will be given as to what my practice should be. I need hardly say that this would be of great assistance to me in dealing with future cases."

Whitmore Richards, for the applicants and the respondents James Connell and Sam Connell. The applicants are persons

aggrieved by a decision of the Public Trustee within the meaning of s. 10 of the Public Trustee Act, 1906. (1) The investigation and audit of trust accounts are provided for by s. 13 of the Act, and by sub-s. 5 the expenses of the audit are to be borne by the estate "unless the Public Trustee otherwise directs." In this case he has "otherwise directed" and ordered us to pay the costs personally under the latter part of sub-s. 5.

T. J. C. Tomlin, for the respondents Sam Oddy and Elizabeth Oddy. There are two preliminary objections to this application—first, that there is no right of appeal from a decision of the Public Trustee, and, secondly, that the Public Trustee ought to be represented. Where by statute a matter is put in the hands of a particular officer for decision there is not necessarily any right of appeal from him; for instance, under the Lands Clauses Consolidation Act, 1845, the Court has no jurisdiction over the Master's taxation of the costs of an inquiry before arbitrators. "If the Legislature intended the Court to review the taxation, it ought to have conferred this power by express words. An appeal does not exist in the nature of things: a right to appeal from any decision of any tribunal must be given by express enactment": *In re Sandback Charity Trustees and North Staffordshire Ry. Co.* (2) There is no provision in the Public Trustee Act, 1906, which gives any right of appeal from such a decision as this. The Act is divided into separate parts. The first part refers to the powers and duties of the Public Trustee; the second to officers and their fees; the third, which includes s. 10, is headed "Supplemental Provisions as to Public Trustee." The fourth part refers to investigation and audit, and the fifth to rules and definitions. Sect. 10 does not apply to the subsequent clauses of the Act. That that is so is shewn by the fact that s. 13, sub-s. 7, provides that "Subject to rules of Court, applications under or for the purposes of this section to the High

(1) 6 Edw. 7, c. 55, s. 10:

"(1.) A person aggrieved by any act or omission or decision of the Public Trustee in relation to any trust may apply to the Court, and the Court may make such order in the matter as the Court thinks just.

"(2.) Subject to rules of Court, an application under this section to the High Court shall be made to a judge of the Chancery Division of the High Court in chambers."

(2) (1877) 3 Q. B. D. 1, 4.

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Court shall be made to a judge of the Chancery Division in chambers," a provision which would be superfluous if s. 10, sub-s. 2, to the same effect, applied to s. 13. When it is thought proper to give leave to apply to the Court that is expressly provided for, as for instance in s. 13, sub-s. 1.

Then we submit that the Public Trustee ought to be here.

[PARKER J. No. He was acting judicially.]

Rules 37 to 39 of the Public Trustee Rules, 1907 (1), are the only rules relating to "investigation and audit of trust accounts," and r. 39 shews that, at any rate as regards the amount of remuneration and other expenses, the matter is left to the determination of the Public Trustee.

[PARKER J. It may be that he has a discretion as to the amount. Apparently any beneficiary can, under s. 13, demand an audit as of right, and the Public Trustee has nothing to do with it, except that he may award costs on the ground that the audit has been improperly demanded, or that unreasonable expense has been incurred. When the applicant himself places no limit on what the auditor has to do, he must examine the whole matter from the very beginning. This seems to reintroduce all the evils against which this Court has been struggling for the last century, for an absolute right is given to a beneficiary, unless somebody applies to the Court to prohibit it, to rake up a trust from the very beginning, subject only to the risk of the Public Trustee ordering him to pay the costs.]

And therefore it is not unreasonable that the Public Trustee should have full power as to the costs, without his decision being subject to appeal.

Whitmore Richards, for the applicants. The respondent trustee has waived any objections to the jurisdiction to review the Public Trustee's decision.

[PARKER J. I do not see how he can give me any jurisdiction to entertain an appeal.]

Sect. 10 of the Act gives a right of appeal from a decision under s. 13, sub-s. 5, as to costs.

[He was stopped on this point, and also on the question whether the Public Trustee should have been made a party to the

(1) [1907] W. N. Part II., p. 332.

appeal; and he was then heard on the merits of the case, when his Lordship suggested the order the terms of which are stated at the end of his judgment. This order was consented to by both parties.]

Boraston, for the respondent Sarah Connell, supported the application.

PARKER J. This is a summons by way of appeal from a decision of the Public Trustee. The summons is taken out under s. 10, sub-s. 1, of the Public Trustee Act, 1906, and the decision appealed against is a direction under s. 13, sub-s. 5, of the Act that the costs of an audit under that section are to be borne by the persons who applied for the audit and are not to come out of the estate.

A preliminary objection has been taken to the effect that s. 10 applies only to the acts, omissions, or decisions of the Public Trustee under the preceding sections of the Act, and has no application at all to decisions under s. 13, sub-s. 5. In my judgment, that contention cannot be upheld. In looking through the Act it is evident that in many respects the Public Trustee exercises not only an administrative but a judicial function, and in my judgment s. 10 is intended to give a right of appeal against his decisions, at any rate in all cases where he exercises a judicial function as distinguished from an administrative function—though I am not for a moment suggesting that the section, having regard to the words of the Act, may not apply to everything that the Public Trustee does by way of act or omission.

Sect. 13, when carefully examined, appears to be an exceedingly drastic enactment. It enables any trustee or beneficiary to apply for an audit of the whole accounts of a trust at any time whatever, subject to the limit that the application cannot be made within one year after there has been a prior audit. There is no limit backwards beyond which the audit is not to be extended, and, therefore, in a trust which has lasted thirty or forty years it is open to a cestui que trust to go back to the very beginning, unless, of course, the Court otherwise orders—which means that the audit can only be prevented by an application to the Court

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to stay the exercise of the prima facie right conferred upon the beneficiary. The only penalty for insisting improperly on an investigation of the trust accounts is that to which the applicant is liable under the jurisdiction which the Public Trustee has to order the applicant to pay the costs of the audit. It is quite clear, therefore, that in making such an order the Public Trustee is exercising a judicial function, and when he exercises a judicial function an appeal will in my opinion lie under s. 10.

Another objection taken is that if an appeal lies under s. 10 it is necessary to serve the Public Trustee. In my judgment, that objection also is untenable. I consider that applications under s. 10 are strictly, in their nature, appeals from a person exercising judicial functions, and, being the case, it is not in accordance with ordinary custom, or convenient, that the Public Trustee should be served. Nevertheless, the Court which hears an appeal from his decision may, in matters of doubt, ask him to state his reasons in writing, or to appear and state his reasons.

One other question has been raised with regard to the functions of the Public Trustee. It is said that in this case he did not hear the parties on the question of costs. However that may be, and whether or not he had any particular reason for not hearing them, it appears to me—I express this view merely for his guidance—that where he is exercising a function of this sort he ought to hear the parties if they desire to be heard.

In this case the Public Trustee seems to have had ample grounds on which it was reasonable to make the order which he made. Without saying what conclusion I should have come to if I had considered the whole of the evidence, it appears to me that in a case like this, where the trust was created in 1875, where two fourths of the estate were distributed some years ago, where the remaining two fourths are subject to tenancies for life, and where remaindermen come forward and demand an investigation into the trust extending right back to 1875, and—though their attention is called by the Public Trustee to the fact that the matter may be a costly one and is going back a very long way—insist upon their statutory rights,—in such a case it is a serious consideration whether the costs incurred ought to come out of the trust property. Sect. 13 would otherwise seem to

reintroduce into the administration of trusts one of those abuses which during the whole of the last century judges were trying to get rid of, namely, the right of anybody, however small his interest in an estate might be, to put the estate to the expense of accounts from the very beginning of the trust onwards—in this case the period is over thirty years. It seems to me that the jurisdiction of the Public Trustee to award costs against the applicant for an audit is a jurisdiction which ought to be so exercised as to control the prima facie right of the applicant within reasonable bounds—otherwise, having succeeded by reforms of Chancery procedure in abolishing an abuse which existed many years ago, we should be reintroducing it in a statutory form.

In this case the parties have accepted a suggestion of mine, which was based upon the following facts. The accountant who made the audit, after examining all the accounts, did discover certain errors or irregularities which gave rise to a claim, not against Mr. Sam Oddy, the present trustee, but against a former trustee, and an action in respect of these matters has resulted in a sum of about 155*l.* being recovered. There is a principle upon which this Court very often acts, that where an action is brought and money is recovered for an estate, the persons who bring the action, prima facie at their own risk, are entitled, as a rule, to be indemnified as regards costs out of what they recover—not necessarily out of the estate generally, but out of what they add to the estate by their exertions. I have suggested, and, the suggestion having been acquiesced in by the parties, I order, that the costs of the action—in which the sum of 155*l.* or thereabouts was recovered—of Sam Oddy, the present sole trustee, should be taxed as between solicitor and client, and that, after deducting what he has already received in respect of his party and party costs of the action, the balance should be paid to him out of the 155*l.* or thereabouts recovered in that action; and that the taxed costs of this summons, as between party and party, should be paid, so far as the 155*l.* or thereabouts will extend, out of what remains after paying the costs of S. Oddy; and that if there is anything left of the 155*l.* or thereabouts it shall be paid to the applicants in satisfaction of the 140*l.* which they

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have been ordered by the Public Trustee to pay. But the order of the Public Trustee will stand, and the applicants will have to pay out of their own moneys, plus anything which they get out of the 155*l.* or thereabouts, what they have been ordered by the Public Trustee to pay.

Solicitor for the applicants and for the respondents supporting them: *A. E. Bale.*

Solicitors for the other respondents: *Blundell, Gordon & Co., for Gordon, Hunter & Duncan, Bradford.*

F. E.

C. A. 1911 *Feb.* 7, 8, 25.

OSBORNE *v.* AMALGAMATED SOCIETY OF RAILWAY SERVANTS.

[1910 O. 829.]

Trade Union—Ultra vires—Expulsion of Member—Action for Rescission of Resolution — Illegal Association — Restraint of Trade — Jurisdiction — Enforcing Agreement "for application of funds to provide benefits to members"—Trade Union Act, 1871 (34 & 35 *Vict. c.* 31), *ss.* 3, 4.

The plaintiff, who was a member of the defendant society, a trade union, and had been expelled therefrom by a resolution of the executive committee, brought an action to obtain reinstatement as a member on the ground that his expulsion was ultra vires and void. The defendants took the preliminary objection that the society was at common law an illegal association, and further that having regard to s. 4, sub-s. 3 (*a*), of the Trade Union Act, 1871, the action was not maintainable, being "instituted with the object of directly enforcing any agreement for the application of the funds of a trade union to provide benefits to members." The rules of the society provided that the executive committee could only sanction, as distinct from ordering, a strike, and any member striking without such sanction was not entitled to strike pay. Under certain circumstances the committee were empowered to issue notice papers to the men for signature and, if signed by two-thirds of the men, to fix a day for handing the same to the employers, and if a strike ensued the committee were to assist the men in the struggle. The committee had power to expel a member found guilty of attempting to injure the society or break it up otherwise than as allowed by the rules. Apart from this the rules did not provide that when a strike was sanctioned by the committee every member was bound to strike, nor did they prevent members who had struck from resuming work if they pleased:—

Held, (1.), on construction, that the rules were not in restraint of trade, and that the society was a lawful association at common law;

(2.), distinguishing *Rigby* v. *Connol* (1880) 14 Ch. D. 482, and *Chamberlain's Wharf, Ld.* v. *Smith* [1900] 2 Ch. 605, that the action was not a proceeding instituted with the object of directly enforcing an agreement for the application of the funds of the union "to provide benefits to members"; and consequently that the action was maintainable.

Decision of Warrington J. reversed.

APPEAL from a decision of Warrington J.

The action was brought by the plaintiff, a foreman porter on the Great Eastern Railway, who was formerly a member of the defendant society, but who had been expelled by a resolution of the executive committee. He brought the action against the society and its trustees for the purpose of obtaining the rescission of the resolution of expulsion, his restoration to membership of the society, and his right to benefits as such member. Previously to his expulsion he had been, since 1897, secretary of the Walthamstow branch of the defendant society.

The defendant society was a trade union established in 1872 and registered under the Trade Union Acts, 1871 and 1876.

By his statement of claim the plaintiff alleged that in consequence of the action *Osborne* v. *Amalgamated Society of Railway Servants*, [1907 O. 1463], in which he had succeeded in establishing that the defendant society could not legally make levies upon its members for political and parliamentary purposes (1), the defendant society wrongfully expelled him from the society and dissolved its Walthamstow branch.

The plaintiff claimed (1.) a declaration that a resolution of the executive committee of the society passed on or about June 23, 1910, whereby it was resolved (inter alia) that the plaintiff be expelled from the society forthwith, was ultra vires the society and void, and that the resolution was illegal, unconstitutional, and against public policy; (2.) a declaration that rule 9 (14.) of the current rules of the society was ultra vires, illegal, and void, and was unconstitutional and against public policy; (3.) a declaration that the resolution was ultra vires and void as being unauthorized by the constitution of the society or by any of its rules or by any of the provisions of the Trade Union Acts; (4.) a declaration

(1) *Amalgamated Society of Railway Servants* v. *Osborne*, [1910] A. C. 87.

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that so much of the resolution as related to the dissolution of the Walthamstow branch of the society was ultra vires, illegal, and void; and (5.) an injunction restraining the defendants, their officers, agents, or servants from acting upon or enforcing the resolution or such part of it as referred (*a*) to the expulsion of the plaintiff, (*b*) to the dissolution of the Walthamstow branch.

The defendant society in their defence (paragraph 8) took the preliminary objection that the contract which was constituted by the rules of the society was an illegal one incapable of being enforced under the common law, and further that the action was a proceeding "instituted with the object of directly enforcing" an agreement for the application of the funds of the trade union to provide benefits to members within the meaning of s. 4, sub-s. 3, of the Trade Union Act, 1871. (1)

Rule 1, sub-rule 2, of the defendant society's rules provided that the objects of the society should be "to improve the condition and protect the interests of its members; to obtain and maintain reasonable hours of duty and fair rates of wages; to promote a good understanding between employers and employed, the better regulation of their relations and the settlement of disputes between them by arbitration, or, failing arbitration, by other lawful means; to provide temporary assistance to members when out of employment through causes over which they have no control, or through unjust treatment; to provide legal assistance when necessary in matters pertaining to the employment of members, or for securing compensation for members who suffer injury by accidents in their employment; to aid the young orphan children of all members in scale A; to provide a grant of money to members in scale A permanently disabled or killed by accident, or when by reason of old age they cannot follow their regular employment; also to use every effort to provide for the safety of railway work and of railway travelling; also to provide donations to any charitable institution from which the

(1) The Trade Union Act, 1871, s. 4, provides: "Nothing in this Act shall enable any Court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, namely, ... 3. Any agreement for the application of the funds of a trade union,—(*a*) To provide benefits to members; . . . ."

members may derive benefit; and to have power to render as occasion may arise assistance to other trade unions, and other lawful purposes. Also to enable such members as voluntarily desire it to provide funds for their relief in sickness or temporary disablement and for their interment. The objects of the society shall be pursued and the benefits provided in accordance with the following rules and not otherwise."

Rule 2 provided that for the supreme government of the society there should be an annual general meeting which should have power (inter alia) to inaugurate any movement or decree any proceedings in the interests of the society and its members.

Rule 3 provided that for the general administration of the society's business there should be an executive committee.

Rule 9 (14.) was as follows: "Any member or members found guilty of attempting to injure the society, or to break it up otherwise than as allowed by these rules, and the same being proved to the satisfaction of the executive committee, the committee shall expel him or them from the society, and he or they shall forfeit all claims on the funds and benefits of the society, but he or they shall have the right of appeal to the annual general meeting."

Rule 13 provided as follows: "Sect. III.—(1.) The executive committee is authorised to sanction trade movements of members for the following purposes and for no others, that is to say—

"(*a*) To prevent a reduction in wages.

"(*b*) To prevent an increase in the hours of labour.

"(*c*) To obtain an increase in wages.

"(*d*) To obtain a reduction in the hours of labour.

"(*e*) To remove unjust and oppressive conditions of employment.

"(2.) The authority to the executive committee to give sanction to such trade movements is subject to the following conditions:—

"(*a*) Before any step in connection with a proposed movement is taken the sanction of the executive committee must be obtained. Should any movement take place before such sanction is obtained, the executive committee must not afterwards endorse the same and give their sanction for its continuance.

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Any member striking without the sanction of the executive committee, or in breach of his contract of service with his employer, or doing any other unlawful act or act in contravention of these rules shall not be entitled to the benefit of the protection fund. Any officer of the society assisting in any such unauthorised movement or unlawful proceeding shall be liable to suspension or discharge from his office in the discretion of the executive committee . . . .

"(*f*) In the event of the committee's efforts failing to obtain the concessions asked for within a reasonable period, the executive committee shall be authorised to make an appeal to the company or companies on behalf of the men concerned.

"(*g*) In the event of every effort by direct appeal failing to secure the concessions asked for, the executive committee may offer the company or companies in whose service the men concerned are to refer the matter in dispute to arbitration, or to utilise the powers provided under the Labour Conciliation Act, 1896.

"(*h*) Should the offer of arbitration be refused or ignored, and every effort at pacific settlement fail, then the executive committee may issue notice papers to the men for signature. If two-thirds of the men sign the notice papers, the executive committee may fix a day or days for handing the same to the company or companies, and upon a withdrawal from work in accordance with these notices, it shall be the paramount duty of the executive committee to use every lawful means to assist the men in their struggle, which shall be directed by the general secretary.

"(*i*) Should the vote of the men be adverse to ceasing work, or should the number of the notices signed not warrant their being handed to the company or companies with a reasonable prospect of success, then the sanction of the executive committee shall be withdrawn from the said movement and no further expense shall be defrayed from the society's funds in connection therewith."

Sub-rule (3.) provided for the allowances to be made to members when unemployed in consequence of taking part in any dispute sanctioned by the committee.

The rules also contained provisions with reference to the rights of members to benefits in the event of disablement, sickness, and death.

By a consent order made in chambers it was ordered that the points of law raised by paragraph 8 of the defence should be disposed of as a preliminary point at the trial as if the said points had been set down for hearing pursuant to Order xxv., r. 2.

Warrington J. held (1.), upon the construction of the rules, that the society was illegal at common law as being in restraint of trade, and (2.), on the authority of *Rigby* v. *Connol* (1) and *Chamberlain's Wharf, Ld.* v. *Smith* (2), that the action was a proceeding "instituted with the object of directly enforcing" what was in effect an agreement for the application of the funds of a trade union to provide benefits to members within the meaning of s. 4, sub-s. (3) (*a*), of the Trade Union Act, 1871, and, therefore, that the Court had no jurisdiction to entertain it. He accordingly dismissed the action with costs.

The plaintiff appealed.

Spencer Bower, K.C., *Stuart Bevan*, and *L. W. Byrne*, for the appellant. For the purposes of the present argument all the allegations in the statement of claim must be treated as true. The society is not an unlawful society; its rules are not in general restraint of trade. The onus is on the respondents to prove that the rules, on the face of them, clearly shew illegality as being in restraint of trade, so that the society is an illegal association at common law and therefore one which prior to the Trade Union Act, 1871, could neither sue nor be sued. [Counsel then proceeded with a critical examination of the rules with a view of shewing that they contained nothing in the shape of compulsion or illegality.]

Warrington J. seems to have thought that though there might be nothing illegal in any particular rule by itself, yet that, taken as a whole and worked as they probably would be according to the usual practice and usages of societies of this kind, they would operate unjustly and illegally, and consequently that the agreement into which the members entered by joining

(1) 14 Ch. D. 482. (2) [1900] 2 Ch. 605.

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this society was one which was an illegal agreement at common law on account of its being in restraint of trade. That is a wrong interpretation of these rules. It is for the respondents to make out that any particular rule necessarily leads to illegality, and evidence is not admissible to explain a rule of this kind—*Farrer* v. *Close* (1)—and you cannot construe the rules by reference to the practice: *Russell* v. *Amalgamated Society of Carpenters and Joiners.* (2) It is not correct to say that a contract is illegal if there is any possibility of its being performed legally: *Waugh* v. *Morris* (3); *Edgware Highway Board* v. *Harrow Gas Co.* (4)

None of the cases relied on by the respondents in the Court below have any bearing upon the present case because the rules in all those cases were vitally and substantially different from the rules of this society: the principle to be extracted from them is that where there is a rule directly in restraint of trade, forcing a man who wants to work not to work, then the whole society is rendered illegal; e.g., the rule in *Rigby* v. *Connol* (5) penalizing a man for working in a "foul" shop, or rules authorizing the executive to fine or expel a member for non-compliance with something that would be in restraint of trade. Where the rules are not of that character, there the Court has accepted jurisdiction. The Court declined jurisdiction in *Old* v. *Robson* (6); *Chamberlain's Wharf, Ld.* v. *Smith* (7); *Sayer* v. *Amalgamated Society of Carpenters and Joiners* (8); *Cullen* v. *Elwin* (9); *Russell* v. *Amalgamated Society of Carpenters and Joiners.* (2) There is nothing in any of the present rules involving the compulsion or intimidation of any member who wants to work. The Court exercised its jurisdiction in *Swaine* v. *Wilson* (10) and *Gozney* v. *Bristol Trade and Provident Society.* (11)

The agreement in this case is not one of the agreements within s. 4 of the Trade Union Act, 1871. This action is not

(1) (1869) L. R. 4 Q. B. 602.
(2) [1910] 1 K. B. 506.
(3) (1873) L. R. 8 Q. B. 202.
(4) (1874) L. R. 10 Q. B. 92.
(5) 14 Ch. D. 482.
(6) (1890) 62 L. T. 282.
(7) [1900] 2 Ch. 605.
(8) (1902) 19 Times L. R. 122.
(9) (1904) 90 L. T. 840.
(10) (1889) 24 Q. B. D. 252.
(11) [1909] 1 K. B. 901.

instituted with the object of directly enforcing or recovering damages for the breach of any of the agreements specified in the sub-sections of s. 4. The plaintiff is not seeking to enforce "any agreement for the application of the funds of a trade union" (sub-s. 3) (*a*)) "to provide benefits to members." The plaintiff seeks to enforce his right to membership, not to enforce the benefits flowing from membership. The plaintiff claims a declaration that he is entitled to the status of membership, without which he cannot earn his living or do his duty as a railway servant, and he is entitled to a declaration as to this: *Gozney* v. *Bristol Trade and Provident Society.* (1) To deprive the plaintiff of his membership is to deprive him of his right to vote at general meetings or as to the disposition of the funds of the society.

Rigby v. *Connol* (2) was followed in *Chamberlain's Wharf, Ld.* v. *Smith* (3), but the correctness of *Rigby* v. *Connol* (2) was questioned by Lord Halsbury and Lord Macnaghten in *Yorkshire Miners' Association* v. *Howden.* (4)

[COZENS-HARDY M.R. As far as this Court is concerned *Chamberlain's Wharf, Ld.* v. *Smith* (3) is a binding authority.]

The present case is distinguishable from *Rigby* v. *Connol* (2) and *Chamberlain's Wharf, Ld.* v. *Smith* (3), as the plaintiff is not seeking to enforce any pecuniary benefits conferred by the rules on members. Sect. 4 of the Act may preclude the attempt to enforce pecuniary benefits, but it is not all benefits that are barred. The power to vote whether there should be a strike or not is a very important benefit conferred on a member, but it is not a pecuniary benefit. There are, therefore, several items claimed by the statement of claim which are not within s. 4, and consequently the action can be maintained.

Peterson, K.C., Clauson, K.C., and *H. S. Preston* (for *P. B. Abraham*), for the respondent society. Dealing with the second point in the appellant's argument first, we say that this is a voluntary association, and any action asserting rights against a voluntary association must be based upon property. The plaintiff cannot bring an action for the purpose of asserting his right to

(1) [1909] 1 K. B. 901.
(2) 14 Ch. D. 482.
(3) [1900] 2 Ch. 605.
(4) [1905] A. C. 256, 261, 264.

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vote; he can only bring an action by reason of the fact that he is interested in the funds of the society, in other words that he is interested under an agreement "to provide benefits to members" within s. 4, sub-s. 3 (*a*). The case is within *Rigby* v. *Connol* (1), where the foundation of the jurisdiction of the Court is stated. This action is an attempt directly to enforce this agreement.

[BUCKLEY L.J. There is a distinction between declaring a right to membership and declaring a right to benefits of membership.]

The question here seems to be concluded by the authorities, and to enforce an agreement of membership must be on the basis of the benefit of membership, his right as a member being to participate in the funds. The only right of action is in respect of property.

[BUCKLEY L.J. Surely a right to vote is property: *Pender* v. *Lushington*. (2)]

That was the case of a limited company; there the shareholder was a person who had property and interest in the company. That does not touch the question of a voluntary association where there is no property at all. A parliamentary or burgess vote is a civil right, or conferred by statute; it is not property.

That this is an action for directly enforcing an agreement for the application of the funds "to provide benefits for members" is clear from *Rigby* v. *Connol* (1); *Chamberlain's Wharf, Ld.* v. *Smith* (3); *Mullett* v. *United French Polishers' London Society* (4); *Aitken* v. *Associated Carpenters and Joiners of Scotland*. (5)

Yorkshire Miners' Association v. *Howden* (6) was an action to prevent the misapplication of the funds of the trade union and not to obtain a distribution or share of those funds.

The plaintiff now contends that he is only seeking to be restored to the status of membership, but that amounts to restoring him to a position in which he is entitled to certain benefits which attach to membership.

[BUCKLEY L.J. As a member he may have rights, but they

(1) 14 Ch. D. 482.
(2) (1877) 6 Ch. D. 70.
(3) [1900] 2 Ch. 605.
(4) (1904) 91 L. T. 133.
(5) (1885) 12 R. 1206.
(6) [1905] A. C. 256.

are not enforceable; to restore him to unenforceable rights is obviously not enforcing his rights.]

The substance of the action must be looked at, and the substance of this action, based on rights of property, is for the purpose of enforcing benefits to which the member who contributes to the trade union is entitled under the rules. [*Forbes* v. *Eden* (1) was also cited.]

As to the illegality of the rules of this society, under rule 13, section III. (2.) (*h*), there is power in the executive committee, if two-thirds of the members are in favour of a strike, to call out the whole of the men. The rules are clearly in restraint of trade and the society is illegal.

In *Russell* v. *Amalgamated Society of Carpenters and Joiners* (2) Farwell L.J. said that trade unions were originally formed for a double purpose, one being a diplomatic and militant purpose, and the other a benevolent purpose, namely, for conferring certain benefits on their members. The only means by which a trade union could give effect to the former purpose was the power of compelling a strike and rendering assistance to the strikers. The very object of a trade union on its militant side was to obtain its ends by restraining trade. The rules of this society undoubtedly enable such restraint to be applied. When the executive committee under rule 13, section III. (2.) (*h*), have fixed a day for the handing in of the notices which have been signed by two-thirds of the members, none of those members can return to work except under pain of expulsion by the executive committee under rule 9 (14.). Therefore there is a contract by the men, if they sign notice papers to the extent of two-thirds, to surrender their right to return to work to the executive committee. That is clearly in restraint of trade. Further than that, we say that on the construction of the rules an annual general meeting has power, under rule 2, to decree a strike which is of course binding on everybody. The society is in restraint of trade and consequently unlawful at common law.

Spencer Bower, K.C., in reply. *Rigby* v. *Connol* (3) is not binding on this Court. It is true that it was followed by the

(1) (1867) L. R. 1 H. L. Sc. 568. (2) [1910] 1 K. B. 522.
(3) 14 Ch. D. 482.

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Court of Appeal in *Chamberlain's Wharf, Ld.* v. *Smith*(1), but it was not argued there that the decision in *Rigby* v. *Connol*(2) was wrong. The question, however, is whether the particular thing sought to be done in this action comes within the particular words of s. 4 of the Act of 1871. This is not an action to directly enforce any of the excepted classes of agreement in s. 4. The defendants have failed to sustain the burden which rests on them in raising this preliminary objection of establishing first that this is an excepted agreement within s. 4, and secondly that the society is illegal at common law.

Cur. adv. vult.

Feb. 25. COZENS-HARDY M.R. The plaintiff in this action alleges that he has been unjustly expelled from the defendant society, which is a trade union, without having received notice of the charge (if any) made against him, and without being afforded any opportunity of being heard. He further alleges that the proceeding was not authorized by the rules of the society and was contrary to natural justice, and that the resolution purporting to expel him was passed to punish him for having successfully invoked the aid of the Courts to prevent the application of the funds of the society to illegal purposes and was ultra vires and void.

The defendants do not admit many of these allegations, and they contend in paragraph 8 of their defence that no cause of action is disclosed by the statement of claim, and they rely on s. 4 of the Trade Union Act, 1871. By a consent order made in chambers it was ordered that the points of law raised by paragraph 8 should be disposed of as a preliminary point at the trial of the action as if the said points had been set down for hearing pursuant to Order xxv., r. 2. I regret that the facts have not been ascertained in the usual way, for it is not satisfactory to deal with a purely hypothetical state of facts. But the parties having consented to this course, it is our duty to treat all the allegations in the statement of claim as true, and to consider whether they suffice to entitle the plaintiff to any relief.

(1) [1900] 2 Ch. 605. (2) 14 Ch. D. 482.

The society of which the plaintiff admittedly was a member is a registered trade union governed by rules which were amended in 1905. The contention of the defendants involves two propositions—(*a*) that the society is at common law an unlawful association, and (*b*) that this action is a legal proceeding which no Court can entertain, having regard to s. 4 of the Act of 1871. If either of these propositions is not well founded the defendants fail, and the action must proceed to trial in the usual way. Warrington J. held that both propositions were established, and accordingly dismissed the action with costs. It is necessary to consider these propositions separately.

It is not alleged that the society is unlawful, except on the ground of restraint of trade. There is nothing in the objects of the society as stated in rule 1, sub-rule 2, which suggests illegality. [His Lordship read the rule, and continued:—]

But though the objects are free from the taint of illegality, there may be provisions in the rules which seek to advance the objects by unlawful means. It is remarkable that there is no provision, such as is very often found in rules of trade unions, for calling out members in the event of a strike. It is, however, urged that rule 13, section III., indirectly amounts to such a provision and is in restraint of trade, but I am unable to assent to this view. The executive committee can only sanction a strike, as distinct from ordering a strike, and there are careful provisions to secure legality.

Sub-rule 2 says: "The authority to the executive committee to give sanction to such trade movements is subject to the following conditions: (*a*) Before any step in connection with a proposed movement is taken the sanction of the executive committee must be obtained. Should any movement take place before such sanction is obtained, the executive committee must afterwards endorse the same and give their sanction for its continuance. Any member striking without the sanction of the executive committee, or in breach of his contract of service with his employer, or doing any other unlawful act or act in contravention of these rules, shall not be entitled to the benefit of the protection fund."

The following sub-sections (*b*) to (*g*) are steps towards a pacific

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settlement, and then we come to (*h*) and (*i*). "(*h*) Should the offer of arbitration be refused or ignored, and every effort at pacific settlement fail, then the executive committee may issue notice papers to the men for signature. If two-thirds of the men sign the notice papers, the executive committee may fix a day or days for handing the same to the company or companies, and upon a withdrawal from work in accordance with these notices it shall be the paramount duty of the executive committee to use every lawful means to assist the men in their struggle, which shall be directed by the general secretary. (*i*) Should the vote of the men be adverse to ceasing work, or should the number of the notices signed not warrant their being handed to the company or companies with a reasonable prospect of success, then the sanction of the executive committee shall be withdrawn from the said movement, and no further expense shall be defrayed from the society's funds in connection therewith."

Now it seems to me reasonably plain that the signing of the notices is a voluntary act, and that the only notices to be handed in are those which have been thus voluntarily signed. Warrington J. held, and I agree, that there is no taint of illegality in this voluntary act on the part of the two-thirds majority. I can find nothing to hinder a man who has handed in his notice from resuming work. He will, under sub-rule 3, cease to be entitled to strike pay, but that is all. Nor can I find any trace of an intention to call out, or to put pressure upon, those members, the minority, who have not voluntarily signed.

Warrington J. thought he found it in rule 9, sub-rule 14: "Any member or members found guilty of attempting to injure the society, or to break it up otherwise than as allowed by these rules, and the same being proved to the satisfaction of the executive committee, the committee shall expel him or them from the society, and he or they shall forfeit all claims on the funds and benefits of the society, but he or they shall have the right of appeal to the annual general meeting." This rule is the only provision for expelling a member, and it is apparently the rule under which the plaintiff's expulsion is justified. I am

not prepared to hold that a member who declines to join with the majority of his fellow workmen in signing and handing in notices can be said to be "guilty of attempting to injure the society." Illegality must not be presumed or inferred. It must be established, if at all, upon some plain provision in the rules: see *Swaine* v. *Wilson*. (1) I can find no such provision in the rules of this society.

It follows that, in my opinion, the first proposition is not established. The society is a lawful association at common law. It is possessed of considerable property which belongs to the members, and any member unjustly excluded may invoke the assistance of the Court. This principle has been repeatedly acted upon in the case of West-end clubs, and the conclusion is enough to dispose of the appeal in favour of the appellant; but we have had able arguments on the second proposition, and it seems desirable that I should state my view upon it, in case it should be held elsewhere that the society is an illegal association at common law on the ground of restraint of trade. I may add that the mere introduction of some objectionable rules will not necessarily taint the whole of the rules. As was observed by Lindley L.J. in *Swaine* v. *Wilson* (2), "No doubt if the real object of this society were unduly to fetter trade its rules might all be tainted by the vice of the object, and none of the rules might be enforceable." In the present case there is no evidence to shew how the rules are in fact used, even if such evidence would be admissible, as to which I express no opinion. We have nothing but the rules before us, and everything turns upon the construction of these rules.

The second proposition depends upon ss. 3 and 4 of the Act of 1871. Sect. 3 is perfectly general: "The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void or voidable any agreement or trust," and if it stood alone it would validate and make enforceable the whole agreement contained in the rules. But s. 4 qualifies it to some extent: "Nothing in this Act shall enable any Court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for

(1) 24 Q. B. D. 259. (2) 24 Q. B. D. 260.

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the breach of any of the following agreements, namely," and the section goes on to specify particular agreements.

The real question is whether the present action is a legal proceeding "instituted with the object of directly enforcing or recovering damages for the breach" of an "agreement for the application of the funds of the trade union to provide benefits to the plaintiff." Now, apart from authority, I should answer this question in the negative. The statement of claim asks a declaration in several forms to the effect that the resolution purporting to expel the plaintiff is ultra vires and void, and an injunction to restrain the society from acting upon and enforcing the resolution. It does not claim the payment of any sum of money out of the funds of the union. If the plaintiff obtains the relief he seeks, he will be entitled, not as a matter of legally enforceable right, but as a matter of reasonable expectation, to certain benefits for which he has subscribed. If a member is threatened with expulsion on grounds not justified by the rules, there is nothing in s. 4 which prevents him from maintaining an action to restrain the contemplated wrong. And I see no reason why the mere passing of the resolution should preclude the Court from giving relief.

The language of s. 4 is narrow, and it ought not to be construed so as to cover every agreement under s. 3. I may add that the plaintiff has an interest in the funds of the society, an interest which, in the event of a dissolution of the union, may be asserted in a Court of justice: see *In re Printers and Transferrers' Amalgamated Trades Protection Society.* (1) He has rights of voting under rule 9, sub-rule 11, and a right of voting is a property right.

I have felt some doubt whether the authorities leave it open to this Court to adopt the construction which personally I think correct. The first of these authorities is *Rigby* v. *Connol* (2), decided in 1880 by Sir George Jessel as Master of the Rolls. There the plaintiff, who had been expelled, wrongfully, as he alleged, expressly claimed to be entitled to participate in the property and effects of the union and in its rights, privileges, and benefits, and an injunction to restrain the defendants from

(1) [1899] 2 Ch. 184.

(2) 14 Ch. D. 482.

excluding him from such participation. This came within the very words of s. 4, and I feel no doubt that the decision of Sir George Jessel dismissing the action was perfectly correct. But there are observations in the judgment of Sir George Jessel which seem to greatly enlarge the operation of s. 4, and in effect to exclude the intervention of the Court in any question arising upon the agreement constituted by the rules.

The Court of Appeal in *Chamberlain's Wharf, Ld.* v. *Smith* (1), the facts of which were substantially the same as the facts in *Rigby* v. *Connol* (2), except that it fell within sub-s. 1 of s. 4 and not within sub-s. 3, followed that case. They did not, however, discuss the general observations of Sir George Jessel. But in *Wolfe* v. *Matthews* (3) Fry J. declined to follow *Rigby* v. *Connol* (2) if it decided that the Court would not enforce any such agreement. There the plaintiffs pleaded that they were members of the society, and as such were entitled to receive out of the funds certain payments and other benefits as provided by the rules, and they sought an injunction to restrain the application of any part of the funds in carrying out an amalgamation which was alleged to be illegal. Fry J. drew a distinction between "directly enforcing" and "indirectly enforcing," and overruled a preliminary objection based upon s. 4.

This view was distinctly adopted by the Court of Appeal and by the House of Lords in *Yorkshire Miners' Association* v. *Howden*. (4) The criticisms of Lord Halsbury at p. 260, of Lord Macnaghten at pp. 265 and 266, and of Lord Lindley at pp. 282 and 283 satisfy me that I am not precluded by *Rigby* v. *Connol* (2) and *Chamberlain's Wharf, Ld.* v. *Smith* (1) from adopting the view which, apart from authority, I should have held. And in truth the decision of this Court and of the House of Lords in the former action between the plaintiff and the defendants involves the same principle.

It follows, therefore, that in my opinion the second proposition as well as the first proposition upon which the defendants rely cannot be maintained. The appeal must be allowed with costs

(1) [1900] 2 Ch. 605.
(2) 14 Ch. D. 482.
(3) (1882) 21 Ch. D. 194.
(4) [1905] A. C. 256.

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here and below, and the action must proceed to trial in the usual course.

FLETCHER MOULTON L.J. The plaintiff in this case is a foreman porter who has for many years been a member of the defendant society. In the month of June, 1910, the executive committee of the society purported to expel him therefrom. He contends that their action was illegal and claims from the Court a declaration that he still remains a member. In their statement of defence the defendant society raise various issues of fact and in addition assert that the statement of claim shews no cause of action. By an order of the Court made under the provisions of Order xxv., r. 2, the points of law thus raised are to be heard and decided before the other issues raised in the action are dealt with. On the hearing of the argument on the points of law the learned judge in the Court below decided them in favour of the defendants and accordingly dismissed the action. It is from this decision that the present appeal is brought. The point of law raised by the defendants in support of their allegation that the statement of claim discloses no cause of action is that an action to establish a claim to membership of the defendant society is a legal proceeding instituted with the object of directly enforcing an agreement for the application of the funds of the society to provide benefits to members, and that, as it is a society whose rules are in restraint of trade, the Courts are not competent to entertain such a proceeding by reason of s. 4, sub-s. 3 (*a*), of the Trade Union Act, 1871.

It is evident that to make good this preliminary objection to the plaintiff's claim the defendants must establish that they are in fact a society whose rules contain provisions in restraint of trade in such wise that prior to the Trade Union Act, 1871, they would have been an illegal association. This is a point which depends on the rules of the society, which the Courts must construe for the purpose, due regard being had to the principle that it is for the defendants to establish that the society would have been illegal at common law. Illegality is not to be presumed. But this issue becomes immaterial if the Courts would have jurisdiction to entertain the action even if the

defendants be a society whose legality rests upon the provisions of the Act of 1871, and as this is a point of law of wide general interest, I propose to give my opinion upon it before considering the particular case of the defendant society.

The decision of this point turns entirely on the effect of ss. 3 and 4 of the Trade Union Act, 1871. Those sections effected a material change in the position of trade unions in respect of agreements and trusts. Prior to that Act, if the purposes of a trade union were in restraint of trade, as was usually the case, the union was an illegal body, and all agreements made by it and all trusts for its purposes were tainted with illegality and, consequently, were unenforceable by the Courts. But by s. 3 of this Act it was provided that the purposes of a trade union should not be unlawful merely by reason that they were in restraint of trade so as to render void or voidable any agreement or trust.

It follows, therefore, that in such a case as that which is now before us (where no illegality is suggested other than that the object and rules of the society are in restraint of trade) the position of a trade union is the same as that of any other association of the like kind for purposes lawful under common law so far as the validity of any agreement or trust is concerned.

But although the existence of such purposes was no longer to have the effect of making the contracts of such a trade union void or voidable, the Act did not place all such contracts in the same position as contracts made between other parties. Had clause 3 stood alone, all valid contracts by or with such a trade union could have been enforced by appeal to the Courts, or damages could have been obtained for breaches of them. But the Legislature declined to go so far as this in legitimating the position of trade unions. By s. 4 it leaves certain classes of agreements specified in that section still under disabilities. Nothing in the Act is to enable any Court to entertain any legal proceedings instituted with the object of directly enforcing or recovering damages for the breach of any agreement which falls within any of those classes. So far, therefore, as the jurisdiction of the Courts is concerned with enforcing those agreements or recovering damages for breaches of them, those

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contracts are left in the same position as that in which they stood prior to the Act.

To illustrate the combined effect of ss. 3 and 4 of the Act I will take an example which is quite outside the circumstances of the present case. Suppose that a trade union agrees to make a contribution to an employer in consideration of his acting in conformity with the rules or resolutions of the union. Such an agreement is valid under the provisions of s. 3 of the Act. To use the funds of the trade union for the purpose of making such a payment is neither ultra vires on the part of the officials of the trade union nor a breach of trust on the part of the trustees in whom those funds are vested. If the payments are made they are in the eye of the law payments made for valid consideration and can under no circumstances be recovered back. But such a contract comes within the provisions of clause 4. It follows that if the trade union, after making such an agreement (which, as I have said, is valid), chooses to refuse to make any of the stipulated payments, neither the aggrieved party nor any other person can compel it to do so. The law refuses its assistance in the matter, and thus in effect leaves it entirely at the option of the trade union whether it will or will not fulfil its engagement.

The only disabilities, therefore, under which a trade union or its members lie relate to the enforcement of contracts and not to their validity. In the present case we have to assume for the purposes of this argument that the plaintiff lawfully became and continued to be a member of the trade union, and that he has been wrongfully expelled therefrom. He comes to the Courts to have this wrong righted. If this had not been a trade union, but some society whose lawfulness did not depend on the Act of 1871, no one could have seriously contended that the Courts could not entertain his claim for reinstatement into his former position of membership.

Now trade unions and their members are, as I have said, in as good a position in all respects as other societies and their members, except as regards the enforcement of contracts, and there only if the contract which is sought to be enforced comes within one of the excepted classes. The contract of membership

is the contract which the plaintiff seeks here to enforce. He says that he has been admitted to membership and has performed all conditions for his continuance therein. This is not denied for the purposes of to-day. But the defendants say that this demand for reinstatement is a legal proceeding instituted with the object of directly enforcing an agreement for the application of the funds of the trade union to provide benefits for members. If they are wrong in this, the appeal must be allowed and the action go to trial on the facts.

To test this, let us assume that the relief is granted, and that the plaintiff is declared a member of the trade union. Will the effect of that be to enforce an agreement for the application of the funds of the trade union to provide benefits for him? The only possible answer to this question is "Certainly not." By the statute that is the very thing which his membership does not entitle a man to do, and therefore declaring him a member simpliciter not only does not directly enforce an agreement for the application of funds for his benefit, but does not even help him in any future proceeding to enforce any such agreement. It seems to me to be a logical contradiction to say that to put a man in a position where he cannot enforce a particular agreement is enforcing it.

All that the Court is asked to do here is to declare that the plaintiff is entitled to the performance of the agreement to accept and to keep him as member, and inasmuch as this is not in itself an application of the funds of the trade union to provide benefits for a member and does not even enable the plaintiff by subsequent proceedings to enforce any agreement so to apply them, the subject-matter of this action appears to me to be entirely outside the excepted classes enumerated in s. 4.

The same conclusion may be arrived at by another course of reasoning. The Act of 1871 by s. 3 rendered legal the contracts of a trade union. This includes the contract of membership, and in *Yorkshire Miners' Association* v. *Howden* (1), and more recently in the case of *Amalgamated Society of Railway Servants* v. *Osborne* (2), we find the Courts, including the House of Lords, enforcing at the suit of members of trade unions rights arising

(1) [1905] A. C. 256. (2) [1910] A. C. 87.

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out of their contract of membership in the one case against the society itself and its officers, and in the other case against the trustees of its funds. It is true that in each of these cases the membership of the plaintiff was admitted, but it is impossible to conceive that the mere non-admission of the membership of the plaintiff on the pleadings would have been a bar to the jurisdiction of the Courts to entertain the action. If the law is prepared to defend personal rights it must possess the power of deciding who possesses them. Further, a suit to defend the property of the society can certainly be brought by the society itself since the Act of 1871. To enable this to be done was one of the main objects of that Act. In such a suit the Courts must of necessity decide whether the plaintiff has the right to call itself the society. This may well depend on decisions as to membership. Schisms are not confined to religious bodies; they may also exist in voluntary associations of other kinds, and it requires no stretch of imagination to conceive that a dispute might arise in a trade union in which the one side or the other by illegal expulsions or admissions, or by other violations of its rules, might wrongfully claim to have a majority in the executive committee or at the annual meeting, and thus to be entitled to act in the name of the society. In a suit purporting to be in the name of the society the Court must decide whether the plaintiffs are entitled to use its name, and this must entail in such a case an examination as to the legality of the acts and their legal effect on membership. Otherwise the rights of members would be at the mercy of those who should be the most persistent in pursuing illegal courses. When the Legislature legalized the status and contracts of trade unions it was to save them from such chaos as this.

If the limitations to the action of the Courts contained in s. 4 be closely looked at it will be found that they leave untouched the jurisdiction of the Courts to pronounce on the meaning or validity of any contract whatever. It must be borne in mind that since the Judicature Act the Courts have jurisdiction to make declarations without granting consequential relief, and even when consequential relief is not asked. Sect. 4 only limits the jurisdiction to give relief of certain types in certain cases. It affords

no bar to any party who claims to be interested in contracts which are legally valid coming to the Courts to obtain a pronouncement as to his rights thereunder. Such a pronouncement will leave those rights enforceable or not according as they do not or do come within the exceptions of s. 4. It is such a pronouncement that the plaintiff seeks in the present action and nothing more. The injunction asked for is only the necessary consequence of the declaration to which the plaintiff is entitled and is in no wise affected by s. 4.

It follows therefore that on the interpretation of the statute I should hold that judgment must be given for the plaintiff in this appeal. But it is said that I am precluded from so holding by the existence of certain decisions binding on this Court. The two cases relied on by the respondents' counsel in this behalf were *Rigby* v. *Connol* (1), before Sir George Jessel M.R., and *Chamberlain's Wharf, Ld.* v. *Smith* (2), before the Court of Appeal. Sir George Jessel M.R., before whom the case of *Rigby* v. *Connol* (1) came, decided in favour of the defendants on the ground that s. 3 and s. 4 of the Act of 1871 conferred no jurisdiction on the Court to entertain the plaintiff's claim, and that therefore it was in the same position as though that Act had not passed and the trade union had been an illegal association. I think that the explanation of this decision is to be found in the nature of the relief asked. Had the claim of the plaintiff been limited to his restoration to membership the result of the case might have been different. But it is clear that the learned judge considered the claim in substance to go far beyond this and to be an attempt to obtain an order of the Court giving him a share in the assets of the union. He says (3): "I am satisfied that the agreement contained in the rules is an agreement to provide benefits for members, and that, if I decide in favour of the plaintiff, I directly enforce that agreement, because I declare him entitled to participate in the property of the union, and the only property they have is their subscriptions and fines, and I restrain the society from preventing that participation. It seems to me that is directly enforcing that

(1) 14 Ch. D. 482. (2) [1900] 2 Ch. 605.

(3) 14 Ch. D. 490.

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agreement, in fact, it is in substance directing and enforcing the specific performance of it, nothing more or less." Such language would have been quite inappropriate had the claim been to membership only.

The learned judge also lays down that the jurisdiction of the Court to prevent a member of a voluntary association from being improperly expelled is based on the right of property vested in the member of which he is unjustly deprived by such unlawful expulsion, and that no Court of justice can interfere so long as there is no property the right to which is taken away from the person complaining. If by the term "property" the learned judge intended to mean a beneficial interest in land or chattels, I am of opinion that this dictum goes too far. There are many rights which in such a sense could not be called rights of property, which, nevertheless, the law will protect, as, for instance, if there was an association of men subscribing for a benevolent purpose, say for the endowment of a scientific institution, the whole funds of the association being dedicated to that charitable purpose on the terms that the administration should be under the control of the association, I can see no reason why membership of such an association should not have the same legal protection as would be given in the case of an association where the members had a beneficial interest in the funds.

But I do not think it at all necessary to examine this part of the judgment, because in the case of a trade union such as the present there is undoubted interest in property, even in the narrow sense of the word. The funds of the union belong to the members, and are by reason of agreements and trusts which are valid in law appropriated to the purposes of the trade union, and more especially to giving benefits to members. Should the trade union be dissolved these funds would be divided amongst its members. While it is in existence these members are eligible, and are the only persons who are eligible, to receive the benefits which by its rules follow from membership. They have the right to come to the Courts to protect the misapplication of those funds. It is true that they cannot enforce the application of the funds to the granting of those benefits, but that is a defect in their remedies and not in their rights. Accordingly it is not

necessary to discuss the limits of the jurisdiction of a Court in this respect.

If the learned judge is to be understood to have decided that the mere declaration that the plaintiff in that case was entitled to membership would amount to decreeing the specific performance of the whole contract of membership, as some of the expressions in his judgment would seem to imply, I respectfully differ from that decision. But I agree that, if it had been so, the decision of the case would have been right and on right grounds. I prefer, however, to treat it as a case in which the plaintiff sought relief so extensive as to render the action a proceeding instituted with the object of directly enforcing an agreement for the application of the funds of a trade union to provide benefits for members. That being so, the Court could not entertain it, and that none the less because some portion of the relief included in the general claim for relief in the action might by itself have formed the subject of a proper and maintainable action.

In the case of *Chamberlain's Wharf, Ld.* v. *Smith* (1) the plaintiff company had been a member of a voluntary association called the Tea Clearing House, the members of which were dock companies and tea warehouse keepers. Its object was to compel its members to charge certain scheduled rates on teas and no other, and, indeed, the whole of the rules were directed towards securing this. It would not be too much to say that the whole agreement of membership might be aptly described in the words of s. 4, sub-s. 1, as an "agreement between members of a trade union as such, concerning the conditions on which any members for the time being of such trade union shall or shall not sell their goods or transact business." The committee had found the plaintiff guilty of departing from these rules as to trading, and expelled him, and he came to the Court to restrain them from so doing. The defendants claimed that the Act of 1871 had given to the Court no power to entertain the claim, and grounded the contention solely on s. 4, sub-s. 1.

There could be no doubt that independently of the Act of 1871 the Court was not competent to entertain it. The Court

(1) [1900] 2 Ch. 605.

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of Appeal held that the contention of the defendants was well founded and dismissed the action on the ground that it was instituted with the object of directly enforcing the agreement contained and embodied in the rules of the association, and that this agreement came within the terms of s. 4, sub-s. 1, of the Act of 1871.

There is nothing in this decision which affects the present case, in which it is admitted by the defendants that s. 4, sub-s. 1 has no bearing on the case, and that in order to succeed they, must bring the matter within the ambit of the widely different provisions of s. 4, sub-s. 3 (*a*). Without, therefore, expressing my agreement or disagreement with the decision—which, of course, binds me—I am satisfied that it does not conflict with my judgment on the point involved in the present case. I am of opinion therefore that the decisions relied on by the respondents do not prevent the Court deciding this point of law in favour of the appellant.

It remains to consider the other point, namely, whether the rules of the society shew it to be an association which would have been illegal at common law prior to the Act of 1871. On reading the rules one is struck by the absence of all the familiar provisions relating to strikes and the power of the society to direct whether men shall or shall not work under particular circumstances which are so frequently to be found in the rules of trade unions. The ingenuity of respondents' counsel could only find two places in the rules in which he could with any plausibility argue that they were in restraint of trade.

The first, and the one on which the argument of the respondents chiefly turned, is to be found in the sub-clauses (*g*), (*h*), and (*i*) of section III. of rule 13, which prescribes and limits the powers of the executive committee in dealing with trade disputes. It was contended that the construction to be put on these clauses was that the reference to notice papers to be handed in meant that every member was compellable by the executive committee to sign a notice paper under the circumstances therein referred to, and that the handing in of the notice papers meant the handing in of notice papers on behalf of all the members.

Even if sub-clause (*h*) stood alone, I should think this to be

an unwarranted construction of the language used, but sub-clause (*i*) in my opinion points so clearly to the fact that the notices to be handed in are only those voluntarily signed by the men that all doubt on the question is removed. I am, therefore, of opinion that this group of sub-clauses contains no provision in restraint of trade such as would render the association illegal at common law.

The other passage relied on on behalf of the respondents has occasioned me more difficulty. By rule 2, section 4 (*f*), it is provided that the annual meeting shall have power to inaugurate any movement or decree any proceedings in the interests of the society and its members. These are very wide words, which, if taken in all their breadth, might cover almost anything. Some reasonable limit must be put upon them, and the proper mode of construction is in my opinion to treat the rules as indicating the nature of the movements or proceedings there referred to. The Courts will not hold an association to be illegal at common law unless it clearly appears from the rules of the association that its objects are in restraint of trade to an unreasonable extent, and I do not think that we should be justified in construing this provision as giving undefined powers to act in restraint of trade if we came to the conclusion, as I do, that there is nothing else in the constitution of the society as defined by its rules, and nothing in the objects of the society as set out in rule 1, sub-rule 2, which points to such illegality. I am therefore of opinion that the contention of the appellant is right on this point also, and that the respondent association is not shewn to be an association which would be illegal at common law.

On both grounds, therefore, I am of opinion that this appeal should be allowed and the preliminary objection to the trial of the action be overruled.

Buckley L.J. The joint effect of ss. 3 and 4 of the Trade Union Act, 1871, is to render lawful the contract of co-membership in a trade union even if it have purposes in restraint of trade, but to render certain of the mutual relations unenforceable. The judgment under review affirms that such a lawful contract

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of co-membership cannot be enforced. In this judgment I shall give my reasons for holding that this is not the law.

I will for the moment and in the first instance assume that the trade union with which I have to do is a society illegal at common law as having purposes in restraint of trade. Upon that assumption there arises that which is by far the most important question in the case, namely, the question of the effect of ss. 3 and 4 of the Trade Union Act, 1871. I address myself in the first instance to the language of the Act itself, to the exclusion of the decisions to which we have been referred, and for this reason, that I sympathize with Lord Macnaghten in the opinion which he expressed in *Yorkshire Miners' Association* v. *Howden* (1), that "the difficulty is not so much in the language of the Act as in the language of the learned judges who have expounded it. The commentaries are in fault rather than the text."

Assuming a society illegal at common law by reason of having purposes in restraint of trade, s. 2 of the Act of 1871 renders those purposes lawful in any question of criminal liability for conspiracy. Sect. 3 renders those purposes lawful in any question of validity of agreement or trust. By virtue of s. 3 contractual relations which would have been void for illegality become lawful contractual relations and enforceable accordingly. But this is qualified by s. 4. That is a section which carefully defines certain agreements which may form part of the contractual terms and enacts that nothing in the Act shall enable any Court to entertain any legal proceeding to enforce those defined agreements. Notwithstanding that s. 3 has rendered contractual relations which include such terms lawful, the particular defined agreements are nevertheless to be unenforceable in any Court. Amongst those defined agreements is included "any agreement for the application of the funds of a trade union to provide benefits to members." The contention before us has been that this action is one in which the plaintiff asks the Court to entertain legal proceedings to enforce an agreement for such an application of the trade union funds and that the statute has precluded the Court from entertaining it.

The action is one brought by a plaintiff who was a member of

(1) [1905] A. C. 263.

the society and has been expelled therefrom. He asks for a declaration that the resolution for his expulsion is ultra vires, and an injunction to restrain the defendants from acting upon or enforcing it. He was a person who before his expulsion enjoyed certain contractual relations with the other members of the society, which even if the trade union was illegal at common law were by s. 3 of the Act lawful as matter of contract between him and his co-members. He enjoyed a vote as a member, a right to subscribe to certain funds, a right to benefits from those funds, an interest in common with his fellow members in the property of the society, a like right in all the advantages of membership, and, in case the society should be dissolved and the common purposes thus come to an end, a right to his distributive share of the assets. These rights were all, by virtue of s. 3, lawful, although some, but not all, were by virtue of s. 4 unenforceable. The right to have benefits from the funds was unenforceable; others seem to me to be clearly enforceable. There is nothing in s. 4 to forbid a Court to entertain legal proceedings to enforce the member's right to his vote or his right to his distributive share in winding up. It is quite plain that he had rights in respect of property. All the property of the society belonged to him and his co-members, and none the less because s. 4 renders unenforceable certain rights in respect of that property. His vote was property: *Pender* v. *Lushington*. (1) The jurisdiction of the Court is therefore not excluded by any absence of rights of property. But it is said that an order to declare his expulsion ultra vires and a proper consequential injunction will be an enforcement of the agreement in the rules to apply the funds to provide him with benefits. I cannot follow the contention. The plaintiff was a member of a society with (amongst others) rights as regards those benefits which were unenforceable. How can an order to restore him to membership do more than make him what he was before, namely, a member with the same unenforceable rights? How does such an order enforce those rights? What benefit in the application of the funds is it that the order compels the society to give him? Obviously none. If he succeeds in the action he

(1) 6 Ch. D. 70.

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merely resumes the position in which he stood before. His rights by way of benefit are neither greater nor less than before his expulsion. The whole answer to the contention on this part of this case may be summarized in a sentence. An order to restore to membership with unenforceable rights is no order to enforce those rights. Warrington J., however, felt himself constrained by authority to hold otherwise. I do not think he was so bound, at any rate after what had been said in the House of Lords in *Yorkshire Miners' Association* v. *Howden* (1), and whether he was or not I think that we are not so bound. The authorities which are said to decide the point are *Rigby* v. *Connol* (2) and *Chamberlain's Wharf, Ld.* v. *Smith.* (3) In dealing with those cases, Lord Lindley in *Yorkshire Miners' Association* v. *Howden* (4) said: "The object of the action in each of those cases was directly to establish and enforce the plaintiff's rights as a member of the trade union to the benefits conferred by the rules on the members." If this was so, the action was plainly not maintainable. Sect. 4 forbade it.

In *Rigby* v. *Connol* (2) a member had been expelled for breach of the rules and for refusal to pay a fine which had been imposed for breach of a rule which fell within s. 4, sub-s. 1, of the Trade Union Act, 1871. He brought an action claiming a declaration that so long as he conformed to the rules he was entitled to participate in the enjoyment of the property and effects of the trade union, and an injunction to restrain the defendants from excluding him from participation. Relief in that form he could not have. A declaration that he was entitled to participate could only be made in a case in which the Court could make an order to enforce its declaration. It could not enforce participation in the benefits. Sect. 4, sub-s. 3 (*a*), of the Act forbade it. The dominant sentence in Sir George Jessel's judgment is as follows (5): "I am satisfied that the agreement contained in the rules is an agreement to provide benefits for members, and that, if I decide in favour of the plaintiff, I directly enforce that agreement, because I declare him entitled to participate in the

(1) [1905] A. C. 256.
(2) 14 Ch. D. 482.
(3) [1900] 2 Ch. 605.
(4) [1905] A. C. 283.
(5) 14 Ch. D. 490, 491.

property of the union, and the only property they have is their subscriptions and fines, and I restrain the society from preventing that participation. It seems to me that is directly enforcing that agreement, in fact, it is in substance directing and enforcing the specific performance of it, nothing more or less." If that sentence is understood as meaning that the plaintiff had sued for a declaration that as long as he conformed to the rules he was entitled to participate in the benefits upon the footing that they were enforceable benefits, and was claiming to be reinstated in order to give effect to that declaration of right, the language of Sir George Jessel seems to me to be free from observation, and that as it seems to me is the meaning of his words. If it is to be understood as meaning that an order to restore membership must carry with it as matter of necessity a declaration of a right to participation and an injunction to restrain the defendants from preventing participation, I cannot agree. And nothing in *Chamberlain's Wharf, Ld.* v. *Smith* (1) supports it from that point of view. The decision in *Rigby* v. *Connol* (2) I think was right, for two reasons, namely, first the reason already assigned, namely, that relief by way of enforcement of right of participation was forbidden by the statute, and secondly that to have restored the plaintiff to membership in that case would have involved an investigation of the ground for his expulsion, and that would have involved the question of the validity of the rule for breach of which he suffered. This reason was not assigned by Sir George Jessel, but I think it was a valid ground. The same, as presently pointed out, was the case in *Chamberlain's Wharf, Ld.* v. *Smith.* (1) No similar reason exists in the present case. Osborne was not expelled for breach of any rule covered by any of the provisions in s. 4. Upon the allegations in this pleading he was expelled for resorting to the Courts of this country to enforce the law applicable to the society of which he was a member. The point in *Chamberlain's Wharf, Ld.* v. *Smith* (1) was as follows: There was a rule in that case which fell within the words of s. 4, "agreement concerning the conditions on which any members . . . . shall sell their goods." For a breach of the rule the plaintiffs were expelled in exercise of a

(1) [1900] 2 Ch. 605. (2) 14 Ch. D. 482.

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power of expulsion in the rules. They asked for an injunction to restrain the defendants from acting on the resolution, alleging that they had not had a fair opportunity of being heard in their own defence. Their case, therefore, was that they had not broken the rule. To adjudicate in the action would have involved an investigation whether they had broken it or not. This the Court could not entertain. The action was to enforce an agreement falling within s. 4, sub-s. 1, not affirmatively, it is true, by restraining members from breaking it, but negatively, by restraining the society from expelling them for a breach of it, which the society alleged and they denied. Had the breach been established in the action the Court would have been called upon to decide that the expulsion was valid because the members had broken a rule which could be enforced against them. This the Court could not do. As Rigby L.J. said (1), "They desire to be restored to their membership, and for that purpose to discuss the rules, on the footing of which the committee acted, and they ask the Court to decide this point. The Court has no jurisdiction to entertain the case." Rigby L.J. pointed out that it is only certain agreements which the Act prevents the Court from interfering to enforce. The decision was only that that action was to enforce an agreement falling within the defined class. Lord Macnaghten in *Yorkshire Miners' Association* v. *Howden* (2) criticizes Sir George Jessel's language in *Rigby* v. *Connol* (3) and points out that the Act of 1871 strikes only at certain agreements and leaves the jurisdiction untouched as to everything else. The decisions in both *Rigby* v. *Connol* (3) and *Chamberlain's Wharf, Ld.* v. *Smith* (4), I think, were right. Neither of them is, I think, an authority for the proposition in support of which it has been sought to use them in this case. There are, in my opinion, no words in s. 4 of the Act of 1871 which prevent this Court from entertaining an action in which no larger remedy is sought than an order to restore the plaintiff to the contractual rights flowing from membership, including all such (if any) benefits flowing therefrom as he enjoyed before his expulsion. For these reasons it seems to me that whether this society is illegal at common law

(1) [1900] 2 Ch. 614.
(2) [1905] A. C. 266.
(3) 14 Ch. D. 482.
(4) [1900] 2 Ch. 605.

or not this action can be maintained, and this appeal must be allowed.

Under these circumstances it is not necessary to decide whether the society is illegal at common law or not, but as this question has been argued and the learned judge has expressed an opinion upon it, I will go on to state what is at present my view upon the point. These rules do not, I think, provide that when a strike, or, as the rules call it, a trade movement, is sanctioned by the executive committee, every member is bound to strike. Rule 13, section III. (2.) (*h*), at p. 32, provides that the executive committee may issue notice papers to the men "for signature." This does not, I think, mean notices which they are bound to sign. For the next following words contemplate that some only may sign, and the matter is to go forward if two-thirds sign, but not otherwise. The provision that the executive committee may fix a day or days for handing "the same" to the company means, I think, for handing to the company such notices as have been signed. There is room for a contrary construction on both of these points, but that the construction which I adopt is the better is, I think, supported by the words at the beginning of (*i*). They are words which contemplate that the number of notices signed is not a known but an unknown number. There may be in the grade in which a strike is proposed both union and non-union men, and the words at the beginning of (*i*) I agree may point to a question of discretion to be exercised according as the number of union men is or is not sufficient to justify aggressive proceedings. But this does not cover the ground, for the number of non-union men in the grade would be known from an earlier date. These words contemplate an uncertainty as to the number of notices. The number would not be uncertain if every member was bound to sign. For these reasons I think that these rules do not provide that a member shall be bound to strike if a strike is sanctioned. When the two-thirds who have signed hand in their notices and strike they do so voluntarily and there is nothing unlawful so far. Then, having struck, is there anything to prevent them or any of them resuming work if they think fit? Are they bound to remain on strike until the executive committee give sanction to the

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contrary? I fail to find anything in the rules as to bringing a strike to an end or anything which provides affirmatively either that a man shall strike, or that, having struck, he shall not resume work. It is argued that under rule 9 (14.) at p. 19 a member who does not strike, or, having struck, returns to work, is exposed to expulsion for attempting to injure the society, and that is the view which the learned judge adopted. I feel great difficulty in thinking that this can be so. If it be the fact that the rules reserve to the member freedom of action, it cannot be that he is liable to expulsion for using that freedom as he thinks fit. It is true that if, say, nine-tenths of the men who have struck resume work and the remaining one-tenth do not, it would seem that under rule 13, section III. (3.), at p. 33, the one-tenth would still continue to draw strike pay. This is neither a reasonable nor a probable intention. But in fact the rules are not worked out as regards either strikes or the termination of strikes. A society is not to be found illegal by reason of difficulties in interpreting the rules, but by finding in sufficiently plain language that there are in the rules provisions so in restraint of trade as to render the society illegal at common law. These rules do not, I think, contain anything plain in that direction, and upon this ground I am disposed to think that this society is not illegal. At the same time I repeat that it is not necessary to determine this point. I rest my judgment upon the point which I first discussed. I hold that this action is maintainable, and that this appeal should be allowed with costs here and below.

Solicitors: *C. T. Wilkinson; Pattinson & Brewer.*

G. A. S.

In re SOUTH OF ENGLAND NATURAL GAS AND PETROLEUM COMPANY, LIMITED.

SWINFEN EADY J.
1911
March 11.

Company—Prospectus—Offering Shares to the Public—Facts to be stated—Previous Offer of Shares—Remedy for Omission—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *ss.* 81, 285.

In February, 1910, a prospectus was issued on behalf of a company headed "For private circulation only," but also containing a statement that it had been filed with the Registrar of Joint Stock Companies. It was stated that this prospectus was distributed by the promoter only to shareholders in certain gas companies in which he was interested, and not more than 3000 copies were sent out. In April, 1910, a second prospectus was issued which contained no statement of the first offer of shares. B. applied for and was allotted shares on the terms of the second prospectus. He died soon afterwards. His executors moved to rectify the register by removing his name on the ground that there was a breach of s. 81 of the Companies (Consolidation) Act, 1908, in not stating the offer of shares contained in the first prospectus and the amount subscribed:—

Held, on the evidence, that the circulation of the first prospectus was an offer of shares to the public within the meaning of the Act of 1908. Consequently the second prospectus was a "subsequent offer" within s. 81 of the same Act and the first offer ought to have been stated.

But *held* that the remedy of the allottee was in damages against the persons responsible for the prospectus and not by rescission.

In re Wimbledon Olympia, Ld. [1910] 1 Ch. 630, followed.

The South of England Natural Gas and Petroleum Company was incorporated on January 30, 1909, with a capital of 20,000*l.* divided into 10,000 preference shares of 1*l.* each and 10,000 ordinary shares of 1*l.* each. On February 21, 1910, a prospectus was issued marked "For private circulation only," but also containing a statement "This prospectus has been filed with the Registrar of Joint Stock Companies." It offered for subscription 7000 preference shares, 9900 ordinary shares, and 5000*l.* debentures and stated that the minimum subscription upon which the directors might proceed to allotment was fifty shares. The prospectus was sent, it was stated, only to shareholders in certain gas companies in which Eaton, the promoter of the company, who undertook the distribution of the prospectus, was interested.

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The issue was not publicly advertised, and only 3000 copies were sent out. Only 200 shares were applied for in consequence of this prospectus, and of these 180 were applied for by the directors of the company. In March, 1910, the company applied for and obtained a certificate from the Registrar of Joint Stock Companies that they were entitled to commence business. Upon this application the managing director made a statutory declaration that the prospectus fixing 50*l.* as the minimum subscription had been issued to the public. On April 3, 1910, a prospectus was issued offering 8000 preference and 8000 ordinary shares and some debentures. This prospectus was publicly advertised and issued in the ordinary way. It did not contain a statement of the amount offered for subscription or the amount allotted on the previous allotment as required by the Companies (Consolidation) Act, 1908, s. 81 (*d*). On this issue 1150 ordinary and 943 preference shares were applied for and allotted. C. P. Byrne applied for and was allotted 200 preference shares; he paid 50*l.* allotment money, but died on June 28 without having paid 150*l.* which had by that time become due. This was a motion by his executors to rectify the register of shareholders by removing his name on the ground of the omission in the prospectus.

In answer to this application the managing director filed an affidavit that the earlier issue was private only and not an offer to the public and therefore did not need to be mentioned in the second prospectus.

A. W. Wells, for the applicants. There can be no question that the prospectus of February 21 was intended to be an offer of shares to the public. It purports on the face of it to comply with the provisions of s. 81 of the Companies (Consolidation) Act. It states that it has been filed. If the company did not offer shares to the public no prospectus is required to be filed, only a statement in lieu of prospectus as required by s. 82. The statement of the managing director that it was filed by mistake is worthless in face of his own statutory declaration that it had been issued. The second prospectus contains no statement of the former issue and it is a material omission, for only twenty shares were applied for by the public.

The only question is what is the remedy of the aggrieved shareholders. The point was discussed in *In re Wimbledon Olympia, Ld.* (1), but it was unnecessary to decide it. Neville J. gave the applicant relief upon the ground that he was misled by false statements in the prospectus. What he added about the effect of the omission is merely obiter. *Gover's Case* (2), which was cited, was decided on s. 38 of the Companies Act, 1867, which contained the words "any prospectus not specifying the same shall be deemed fraudulent on the part of the promoters, directors, and officers of the company." Those words are deliberately omitted in s. 81 of the present Act, and the burden of disclosure is thrown on the company, not on the directors. It is a general principle of law that if one of the parties to a contract does not disclose what he is bound to disclose the other party is entitled to rescind the contract—*London Assurance* v. *Mansel* (3)—if the fact not disclosed is material. The materiality is proved by the enumeration in the statute. It is not necessary for the statute to give a right to rescind. It imposes a duty, and the right is given by the general law on breach of that duty.

The shareholder cannot have any effective remedy if he is not entitled to rescission, for the duty of disclosure is thrown on the company.

L. T. Ford, for the company. The prospectus was sent only to a limited class and marked "private." An offer to the public must be "to any person who chose to come in and take them": *Sherwell* v. *Combined Incandescent Mantles Syndicate, Ld.* (4) There was no such offer in this case, and the prospectus is therefore not an offer within the definition clause.

As to the remedy the *Wimbledon Olympia Case* (1) is exactly in point and is sound law.

A. W. Wells in reply.

SWINFEN EADY J. This is a motion by the executors of a deceased shareholder asking that the register of members of the company may be rectified by removing their testator's name. The case made by the applicants is that their testator applied on the

(1) [1910] 1 Ch. 630.
(2) (1875) 1 Ch. D. 182.
(3) (1879) 11 Ch. D. 363.
(4) [1907] W. N. 110.

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terms of a prospectus issued on April 30, 1910, which failed to comply with the Companies (Consolidation) Act, 1908, s. 81 (*d*), in that it was a second offer for shares and did not state the amount offered for subscription and actually allotted on the first offer. On the other hand, it is urged that the first offer was not an offer within the meaning of s. 81, because by the definition clause of the Act (s. 285) a prospectus is defined as an offer of shares to the public, and the prospectus issued on February 21 did not offer shares to the public as it was marked "For private circulation only" and was only issued to the shareholders in certain gas companies in which the promoter was interested. [His Lordship went through the evidence on this point, and proceeded.] I am satisfied that the first prospectus did offer shares to the public, and none the less because copies were sent only to shareholders in gas companies who were the most likely subscribers. It follows that the second prospectus contained a subsequent offer and did not comply with s. 81 (*d*).

Then the question is what is the remedy of the shareholder? Is he entitled to rescind his contract and have his money back? With regard to one of the matters required to be mentioned in the prospectus by s. 81, there are provisions in subsequent sections which entitle the allottee to rescind his contract. Sect. 81 requires the minimum of shares which must be applied for before the directors may proceed to allotment to be stated. Sect. 85, sub-s. 4, provides that if the minimum is not reached the application money is to be returned and makes the directors liable for returning it. Then s. 86 deals with the case of an allotment which is irregular within s. 85. [His Lordship read that section. (1)] In respect of that matter, therefore, there is an express provision enabling an allottee to rescind within a limited time for non-compliance with the statute. There is no provision of that kind in s. 81, nor in any other section relating to the omissions relied on in this case. But the section does

(1) Sect. 86: "An allotment made by a company to an applicant in contravention of the provisions of the last foregoing section shall be voidable at the instance of the applicant within one month after the holding of the statutory meeting of the company and not later, and shall be so voidable notwithstanding that the company is in course of being wound up."

contemplate a liability in damages on the part of the "directors and other persons responsible for the prospectus," for sub-s. 6 exonerates such persons from liability if they can prove certain matters. That is equivalent to saying that they are liable if they cannot prove them. In my opinion the allottee is not entitled to rescind his contract because of any breach of the statutory requirements, which extend to such comparatively unimportant matters as the names and addresses of the company's auditors. His remedy is against the directors and other persons responsible for the prospectus. The same point was dealt with by Neville J. in *In re Wimbledon Olympia, Ld.* (1), where he says, "I cannot attribute to the Legislature the intention that the mere fact of the omission of any of the facts required by this section to be stated should give the shareholders this right to get rid of their shares." I agree with that opinion. The motion therefore fails.

Solicitors: *Trinder, Capron & Co.; Stanley O. Pugh.*

(1) [1910] 1 Ch. 630, 632.

J. R. B.

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Jan. 19, 20, 25, 26; *March* 18.

In re MACKENZIE.

MACKENZIE *v.* EDWARDS-MOSS.

[1910 M. 337.]

Conflict of Laws—Domicil—Matrimonial Domicil—Incapacity of Wife to acquire Separate Domicil—Scottish Husband—English Wife—Marriage Contract—Proper Law—Intention—English Settlement—Separate Use—After-acquired Property Clause—Life Interests—Restraint on Anticipation imposed by Donors—Scottish Law—Marriage Contract before 1881—*Wife's Savings of Separate Income under Contract—Implied Testamentary Power—Pars contractus—Subsequent Creation of Statutory Jus Relicti and Legitim—Effect on Testamentary Power—Married Women's Property (Scotland) Act,* 1881 (44 & 45 *Vict. c.* 21), *ss.* 6, 7, 8.

In the absence of a decree of judicial separation or its equivalent—divorce a mensa et thoro—a wife cannot obtain a separate domicil from that of her husband, unless possibly in the exceptional cases referred to by Lord Cranworth in *Dolphin* v. *Robins* (1859) 7 H. L. C. 418.

Dolphin v. *Robins* 7 H. L. C. 390, 417, 418, 420, 423, explained and applied.

In 1877 a domiciled Scotsman married a domiciled Englishwoman.

By a marriage settlement in Scottish form made between the husband and the wife with her father's consent, funds belonging to the husband were settled for the life-rent use of the wife if she survived him with remainder to the children of the marriage as therein expressed, the provisions to be in bar of claims to jus relictæ and legitim out of the husband's movable estate.

By a contemporaneous settlement in English form made between the wife's father, the wife, the husband, and the trustees, funds belonging to the wife were settled in trust for the wife for life for her separate use without power of anticipation with remainder to the husband for life until bankruptcy or alienation, and subject thereto on the usual trusts for the issue of the marriage, with an ultimate trust in default of issue for the wife if she survived the husband, or her statutory next of kin if she predeceased him.

The after-acquired property clause included life interests. The income of these life interests was to be paid to the wife for her separate use without power of anticipation. They were excluded from the trust for conversion and could only be sold with her consent.

Under the wills of her mother and brother, who died after the passing of the Married Women's Property (Scotland) Act, 1881, the wife became entitled to life interests in movables for her separate use without power of anticipation.

The wife died on August 19, 1909, domiciled in Scotland. She was possessed of considerable free movable estate representing savings of

income of movable property settled to her separate use. By her will she disposed of this property to the exclusion of her husband and child.

The husband and child claimed the jus relicti and legitim created by the Act of 1881, ss. 6, 7. The executors, failing to establish an English domicil, relied on s. 8, which provides that the Act shall not affect any contracts made by married persons before or during marriage:—

Held, that the parties to the marriage contract intended the Scottish settlement to be governed by Scottish law and the English settlement by English law.

In re Hernando (1884) 27 Ch. D. 284; *In re Mégret* [1901] 1 Ch. 547, 549; *Chamberlain* v. *Napier* (1880) 15 Ch. D. 614, 631; *Hamlyn & Co.* v. *Talisker Distillery* [1894] A. C. 202; *In re Fitzgerald* [1904] 1 Ch. 573, 587; and *British South Africa Co.* v. *De Beers Consolidated Mines, Ld.* [1910] 1 Ch. 354, 381—383; 2 Ch. 502, applied.

Held, therefore, that the wife could dispose by will of the savings of income of the separate property comprised in the English settlement.

Taylor v. *Meads* (1865) 4 D. J. & S. 597, 604; *Gore* v. *Knight* (1705) 2 Vern. 535; and *Barrack* v. *M'Culloch* (1856) 3 K. & J. 110, applied.

Held, also, that the after-acquired life interests were caught by the English settlement, notwithstanding the restraint on anticipation imposed by the donors.

Held, also, that even if the English settlement of 1877 was governed by Scottish law, the complete power of testamentary disposition thereby given to the wife (according to the Scottish law of that date) over the savings of separate income therein comprised was a pars contractus thereof, which, having regard to s. 8 of the Act of 1881, was not affected by the jus relicti and legitim subsequently created by that Act.

ORIGINATING SUMMONS.

This was a summons by the husband and the only child of the testatrix against her executors asking for a declaration that the testatrix was domiciled in Scotland at her death, and a declaration that on her death each of the plaintiffs became entitled to one third share, or alternatively that one or other of the plaintiffs became entitled to one moiety of her free movable estate after payment thereout of her funeral and testamentary expenses and debts.

The claims were for jus relicti and legitim under the Married Women's Property (Scotland) Act, 1881, which provides as follows:—

Sect. 6. "After the passing of this Act the husband of any woman who may die domiciled in Scotland shall take by operation of law the same share and interest in her moveable

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estate which is taken by a widow in her deceased husband's moveable estate, according to the law and practice of Scotland, and subject always to the same rules of law in relation to the nature and amount of such share and interest, and the exclusion, discharge, or satisfaction thereof, as the case may be."

Sect. 7. "After the passing of this Act the children of any woman who may die domiciled in Scotland shall have the same right of legitim in regard to her moveable estate which they have according to the law and practice of Scotland in regard to the moveable estate of their deceased father, subject always to the same rules of law in relation to the character and extent of the said right, and to the exclusion, discharge, or satisfaction thereof, as the case may be."

Sect. 8. "This Act shall not affect any contracts made or to be made between married persons before or during marriage, or the law relating to such contracts . . . ."

The spouses were married on June 26, 1877, the husband being a domiciled Scotsman and the wife a domiciled Englishwoman.

By a marriage contract in Scottish form dated June 25, 1877, and made between the husband and the wife with her father's consent, the husband settled a sum of 20,000*l.* payable on his death, secured as to 10,000*l.* on certain lands at Inverewe and Kernsary in the county of Ross, and as to the remaining 10,000*l.* on certain policies of assurance. The trusts were for the life-rent use of the wife should she survive the husband, with remainder to the children of the marriage as therein expressed, and it was thereby declared that the provisions thereby conceived in favour of the wife and of the children of the intended marriage should be in full satisfaction to her of all terce of land, half or third of movables, or other claims competent to her by and through the decease of her husband in case she should survive him, and also in full satisfaction to the children of all claims of legitim or executry competent to them by and through the decease of their father.

By a marriage settlement in English form dated June 25, 1877, and made between the wife's father, the wife, the husband,

and the trustees, two sums of 10,000*l.*, one in possession and the other subject to the life interests of the wife's father and mother, were assigned to the trustees upon trust to pay the income to the wife for life for her separate use without power of anticipation and after her decease to the husband for life until bankruptcy or alienation, and subject thereto on the usual trusts for the issue of the marriage, with an ultimate trust in default of issue for the wife if she survived her husband; or if she predeceased him, for such person or persons as under the statutes for the distribution of the effects of intestates would have become entitled thereto in case she had died intestate and without leaving a husband her surviving.

And it was thereby agreed and declared that if the wife then was or if during the intended coverture she or the husband in her right should at any one and the same time and from the same source become seised or possessed of or entitled to any real or personal property exceeding the value of 1000*l.* or upwards for any estate or interest whatsoever in possession, reversion, remainder, or expectancy (except jewels, trinkets, ornaments, furniture, plate, pictures, prints, books, and other articles of the like nature which it was thereby declared should belong to the wife for her separate use), then and in every such case the husband and wife and all other necessary parties should at the cost of the trust estate as soon as circumstances would admit and to the satisfaction of the trustees or trustee for the time being convey, assign, and assure the said real and personal property to or otherwise cause the same to be vested in the trustees or trustee upon trust that they should with all convenient speed (but as to reversionary property not until it should fall into possession unless it should appear to the trustees that the capital of the trust estate would probably be injured by deferring the sale) sell or call in and convert into money such part or parts of the said property as should not consist of money or of securities thereinbefore authorized as investments or of any annuity or annuities or other estate or interest for the life of the wife or for any term or period determinable upon her death, and should stand possessed of the moneys to arise from such sale, calling in, and conversion and of such part or parts of the

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said property as should consist of money or of such securities as aforesaid and of the investments and income thereof, upon the trusts of the two sums of 10,000*l.* thereby assigned.

And upon trust that the trustees should pay and apply any annuity or annuities and the income of any other estate or interest for the life of the wife or for any term or period determinable upon her death to the persons for the purposes and in manner to whom and for and in which the income of the trust premises the trusts whereof were lastly thereinbefore declared would be applicable under the same trusts. But with power for the trustees with the consent in writing of the wife to sell the same, but so that the money from such sale be held upon the trusts thereinbefore declared concerning such part of the personal estate of or to which the wife then was or she or her husband in her right should become entitled as aforesaid as should consist originally of money.

The wife in fact became entitled to the following further property under the wills of her father, mother, and brother, who all died after the passing of the Married Women's Property (Scotland) Act, 1881 :—

(*a*) 5000*l.* under her father's will. This was paid to the trustees of the settlement.

(*b*) A life interest in 5000*l.* bequeathed by the wife's mother to the wife's brother in trust for the wife for life for her separate use without power of anticipation with a limited testamentary power of disposition over the corpus.

(*c*) A life interest in 20,000*l.* appointed by her mother's will (in execution of a power under her maternal grandfather's will) to the wife for life for her separate use without power of anticipation with remainder to the brother.

(*d*) A life interest in 5000*l.* appointed as in (*c*) with remainder to the wife's sister.

(*e*) A life interest in 50,000*l.* bequeathed by the wife's brother to trustees upon trust for the wife for her separate use without power of anticipation with a limited power by deed or will over the corpus. The brother also gave her a general testamentary power over (*e*).

Item (*b*) was now held by the wife's sister as trustee. Items

(*c*) and (*d*) were held by the defendants as trustees of the grandfather's will. Item (*e*) was held by the trustees of the brother's will.

On August 4, 1880, owing to conduct on the part of her husband which in the opinion of the House of Lords in *Mackenzie* v. *Mackenzie* (1) would have entitled her to a decree of judicial separation, the wife left her husband and resided permanently in England. She never applied for a decree of judicial separation. The husband's proceedings for divorce on the ground of non-adherence and desertion failed before the Lord Ordinary, the Second Division, and finally in the House of Lords: see *Mackenzie* v. *Mackenzie*. (1) These proceedings and the details of the husband's conduct are fully referred to in the present judgment.

By her will, dated July 30, 1900, the wife appointed her sister and her husband's nephew her executors. She exercised her general and special powers of appointment. She gave her residuary real and personal estate to her sister. The plaintiffs took no interest under this will.

The wife died on August 19, 1909, possessed of considerable free movable estate representing mainly if not entirely savings of income of property settled to her separate use.

The plaintiffs made no claim to the corpus of the settled property or the appointed funds, but claimed jus relicti and legitim out of the free movable estate.

The defendants contended that the wife being potentially entitled to a decree of judicial separation was free to acquire a separate domicil from her husband, and had in fact acquired an English domicil. If, however, the wife's domicil was Scottish, they contended that the plaintiffs' rights were barred by the English settlement, as the separate use thereby conferred on the wife's present and after-acquired property would attach to her savings of income and give her a power of disposition thereover.

Evidence as to the Scottish law was given by Clyde, K.C., on behalf of the plaintiffs, and the Lord Advocate on behalf of the defendants.

(1) [1895] A. C. 384.

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Hon. Frank Russell, K.C., and *T. Pakenham Law*, for the plaintiffs. Apart from the exceptional cases mentioned by Lord Cranworth in *Dolphin* v. *Robins* (1) or possibly an actual decree of judicial separation, a married woman cannot obtain a separate domicil from that of her husband: *Dolphin* v. *Robins* (2); *Warrender* v. *Warrender* (3); *Yelverton* v. *Yelverton* (4); *In re Daly's Settlement* (5); *Le Sueur* v. *Le Sueur* (6); Dicey on the Conflict of Laws, 2nd ed. p. 124, rule 9; p. 132, sub-rule 2. In the present case the wife never sought the judicial separation to which she was potentially entitled. She could at any moment have returned to her husband and claimed conjugal rights. She therefore remained throughout a dependent person and incapable of acquiring a separate domicil.

The wife's domicil was therefore Scottish, and the plaintiffs are entitled to jus relicti and legitim. Prior to the Married Women's Property (Scotland) Act, 1881, a husband became entitled on marriage to his wife's movables (including acquirenda) by jus mariti. This could be excluded (inter alia) by ante-nuptial contract, or by the terms of the gift to the wife from a third party. The same principles applied to the jus administrationis which rendered his consent necessary to the wife's dealings with her property even though the jus mariti was excluded. Where both jus mariti and jus administrationis were excluded the wife had absolute control over it. She could dispose of it by deed or will and it was properly described as her separate estate.

The wife, on the other hand, was entitled to jus relictæ and the children to legitim out of the deceased husband's free movables unless excluded by ante-nuptial contract or renunciation inter vivos. These were claims in the nature of postponed debts payable out of the free movables left after paying the true debts, funeral and testamentary expenses, and costs of administration. Being of this nature they could not of course be defeated by the husband's will. The wife took one third if there were legitim,

(1) 7 H. L. C. 418.
(2) 7 H. L. C. 390, 417, 418, 420, 423.
(3) (1835) 2 Cl. & F. 488.
(4) (1859) 1 Sw. & Tr. 574.
(5) (1858) 25 Beav. 456.
(6) (1876) 1 P. D. 139.

one half if there were no legitim. The children took one third if there were jus relictæ, one half if there were no jus relictæ.

Corresponding rights against a wife's movables were for the first time given to the husband and children by the Act of 1881. Sect. 6 applies to marriages before the Act. *Paterson* v. *Poë* (1) and presumably ss. 7, 8 are equally applicable. The plaintiffs are therefore prima facie entitled to enforce their claims unless there is anything in the wife's settlement to exclude them. Now undoubtedly the jus mariti and jus administrationis were excluded. The income and the savings became the wife's separate estate and she could dispose of them, just as in English law: *Taylor v. Meads.* (2) But surely she could only dispose of them by will subject to the claims of her creditors. There is nothing in the settlement to exclude the claims of the plaintiffs as creditors to jus relicti and legitim. This is the opinion of Clyde, K.C. He relies on *Fotheringham's Trustees* v. *Fotheringham* (3), *Simons' Trustee* v. *Neilson* (4), *Buntine* v. *Buntine's Trustees* (5), and *Murray's Trustees* v. *Murray* (6), and considers it quite immaterial whether the wife dies testate or intestate, seeing that the plaintiffs are creditors.

The Lord Advocate, on the other hand, relies on the same authorities and considers that, as the settlement in effect gave the wife a power of disposition which she exercised, the plaintiffs' claims are defeated. If this were not so, he considers that the settlement would be "affected" by the Act. He also thinks, contrary to Mr. Clyde's view, that the spouses contracted that their rights should be governed by English law.

There is, however, nothing in the settlement so inconsistent with the law of the matrimonial domicil as to amount to an intention to exclude that law, and if the Scottish law applies there is nothing to exclude the plaintiffs' rights as creditors. The fact that they only became statutory creditors after the settlement did not "affect" the settlement within s. 8. The wife could still dispose of her free movables, though the amount

(1) (1883) 8 App. Cas. 678; 10 R. (H. L.) 73.
(2) (1865) 4 D. J. & S. 597, 604.
(3) (1889) 16 R. 873.
(4) (1890) 18 R. 135.
(5) (1894) 21 R. 714.
(6) (1901) 3 F. 820.

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disposable was reduced. We therefore claim as statutory creditors against all the savings of separate income and any other free movable estate.

If, however, we are barred by the settlement, we are only barred as to the settled property, i.e., the income of the 20,000*l.* originally settled and of the father's 5000*l.* caught by the after-acquired property clause. The separate use in the life interests in the 5000*l.*, 5000*l.*, 20,000*l.*, and 50,000*l.*, making 80,000*l.*, was attached by the mother and brother, who died after the passing of the Act of 1881. This separate use formed no part of the husband's contract. He took no life interest in these amounts and ought not to be barred of his jus relicti in any savings therefrom. Again these life interests were subject to a restraint on anticipation imposed by the donors. The wife could neither assign them to the settlement trustees, nor could she consent to their sale. They were therefore not caught by the settlement: *Coventry* v. *Coventry* (1); *In re Currey*. (2)

Sir Robert Finlay, K.C., *Micklem, K.C.*, and *F. E. Farrer*, for the defendants. The decision in *Mackenzie* v. *Mackenzie* (3) amounted to "a judicial proceeding enabling the wife to live away from her husband" within Lord Cranworth's judgment in *Dolphin* v. *Robins*. (4) She was clearly entitled to a decree of judicial separation and could therefore acquire a separate domicil. The doctrine that a wife's domicil is that of her husband is founded on her duty to live with him, and ceases with that duty: *Le Sueur* v. *Le Sueur*. (5) The rule certainly ceases on divorce: *Williams* v. *Dormer*. (6) Story on the Conflict of Laws, 8th ed. p. 46, bases the rule on the principle that a person under the power and authority of another has no right to choose a domicil. But in the present case after the decision in the House of Lords the wife was no longer under the power and authority of her husband. A suit by him for restitution of conjugal rights must necessarily have failed. Assuming capacity, the wife clearly abandoned her Scottish domicil and acquired an English domicil.

(1) (1863) 32 Beav. 612.
(2) (1886) 32 Ch. D. 361.
(3) [1895] A. C. 384.
(4) 7 H. L. C. 390, 417.
(5) 1 P. D. 139, 141.
(6) (1852) 2 Rob. Eccl. 505.

Assuming, however, that her domicil remained Scottish, the wife's settlement amounted to a contract between the spouses that their rights should be governed by English law: *Van Grutten* v. *Digby* (1); *In re Hernando* (2); *In re Mégret* (3); *In re Fitzgerald.* (4) The wife's change of domicil on marriage did not affect this ante-nuptial contract: *De Nicols* v. *Curlier.* (5) This argument clearly applies to all the property caught by the settlement even if it does not apply to all her separate estate. Now the life interests in the 80,000*l.* were expressly caught by the after-acquired property clause, though the restraint on anticipation might prevent their sale. The after-acquired property clause would certainly bind the instalments of income. In *Coventry* v. *Coventry* (6) and *In re Currey* (7) an assignment by the wife would have caused a change of interest. In the present case, whether the wife assigned the life interests or the instalments, there would be no change of interest. There would merely be a change of trustees. In *Brooks* v. *Keith* (8) Kindersley V.-C. evidently thought that an assignment in pursuance of a covenant to settle after-acquired property would not be a breach of a clause against alienation. The restraint on anticipation is intended for the wife's benefit and must not be construed to her damage and injury: *Cooper* v. *Macdonald.* (9) The husband cannot derogate from his covenant on a purely technical point, and the life interests are within the protection afforded by the settlement, even if they cannot actually be assigned: *Brooks* v. *Keith* (8); *In re Allnutt* (10); *In re Crawshay* (11); *Lloyd* v. *Prichard* (12); *In re Ellis's Settlement.* (13)

If the Scottish law applies, the settlement bars jus relicti and legitim by implication as to all property caught thereunder. It could not bar them expressly because they were non-existent. But by contracting that the income and the savings thereof

(1) (1862) 31 Beav. 561, 567.
(2) 27 Ch. D. 284.
(3) [1901] 1 Ch. 547, 549.
(4) [1904] 1 Ch. 573, 587.
(5) [1900] A. C. 21.
(6) 32 Beav. 612.
(7) 32 Ch. D. 361.
(8) (1861) 1 Dr. & Sm. 462; 4 L. T. 541.
(9) (1877) 7 Ch. D. 288, 294.
(10) (1882) 22 Ch. D. 275.
(11) [1891] 3 Ch. 176.
(12) [1908] 1 Ch. 265
(13) [1909] 1 Ch. 618.

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should be the wife's separate estate the husband gave her all such powers as in 1877 existed over separate estate, including a power of disposition which she has exercised. That power of disposition was an express pars contractus of the settlement, just as if all the then existing incidents of separate estate had been written out. That being so, her power of disposition could not be "affected" by the jus relicti and legitim subsequently created by the Act of 1881. This clearly applies to all property caught by the settlement. If there were any other separate property not caught by the settlement, we should contend that the settlement itself is a bar as to all separate property, but the point does not arise.

Jus relicti is somewhat analogous to a husband's curtesy in his wife's separate heritable estate in possession. Curtesy arises on the birth of heritable issue, but can always be defeated by testamentary disposition: *Cooper* v. *Macdonald* (1); *Hope* v. *Hope*. (2)

Hon. Frank Russell, K.C., in reply. The settlement does not amount to a contract that the rights of the spouses are to be governed by English law. In *In re Hernando* (3) there was an express contract to that effect. In *In re Mégret* (4) the wife exercised an express power of appointment. But the separate use given by this settlement confers no such power. It merely makes the wife sui juris, and she can only dispose of her property subject to the law of her domicil: *In re Fitzgerald*. (5) In *De Nicols* v. *Curlier* (6) the wife's right existed at the date of the marriage, and the husband could not alter it by changing his domicil. There is nothing in these authorities to shew that a wife can dispose of separate property otherwise than in accordance with the law of her matrimonial domicil.

If, however, the English law applies, it only applies to the property caught by the settlement. It is clear from *Hood Barrs* v. *Heriot* (7), where the earlier forms of restraint are discussed, that the income could not be assigned before it was due. It

(1) 7 Ch. D. 288.
(2) [1892] 2 Ch. 336.
(3) 27 Ch. D. 284.
(4) [1901] 1 Ch. 547, 549.
(5) [1904] 1 Ch. 573, 589, 592.
(6) [1900] A. C. 21, 26.
(7) [1896] A. C. 174, 178.

follows that the life interests in the present case could not be assigned to the trustees and were not caught by the covenant. It is contended, however, that the covenant binds the instalments as they fall due. The answer is twofold. (*a*) Instalments under 1000*l.* are not within the covenant. (*b*) Instalments over 1000*l.* if caught as such would become capital and not income in the hands of the trustees, and would have to be invested. It is quite clear, therefore, that the life interests cannot be caught either as a whole or piecemeal.

As to the Scottish law, there is no analogy whatever between curtesy and jus relicti in separate estate. Curtesy is an estate defeasible by will quite apart from any contract. Jus relicti is a claim by the husband as creditor enforceable against the wife's executors unless barred by contract or renunciation in his lifetime. There is nothing in the settlement to bar jus relicti or legitim, and the plaintiffs are entitled to succeed.

Cur. adv. vult.

March 18. SWINFEN EADY J. This is an originating summons issued by the surviving husband of the testatrix, and also by her only child, as co-plaintiffs, against the executors of the will and codicil of the testatrix, asking to have it determined that the testatrix at the date of her death was domiciled in Scotland; and, upon that being established, to have it determined that according to the law of Scotland, and having regard to the provisions of the Married Women's Property (Scotland) Act, 1881, each of the co-plaintiffs is entitled, in respect of jus relicti and legitim respectively, to a one third share and interest in, or, alternatively, that one of the plaintiffs is entitled to one moiety of, the movable estate of the testatrix, after payment out of that movable estate of the funeral expenses and debts of the testatrix, and notwithstanding any provisions in the will of the testatrix purporting to dispose of all her property.

The defendants dispute the alleged Scottish domicil, and contend that the testatrix had acquired an English domicil at the date of her death; and they further contend that, even if the domicil be Scottish, the plaintiffs are not entitled either to jus relicti or legitim out of the estate of the testatrix.

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On June 26, 1877, the testatrix, then Minna Amy Edwards-Moss, spinster, intermarried with the plaintiff, Osgood Hanbury Mackenzie, of Inverewe and Kernsary, in the county of Ross, a domiciled Scotsman. The marriage continued until the death of the testatrix on August 19, 1909; and the husband continued a domiciled Scotsman. If those are all the material facts the domicil of the testatrix was in Scotland. It is, however, contended on behalf of the defendants that, having regard to certain judicial proceedings between the spouses, the testatrix was at liberty to choose a domicil apart from her husband, and that she in fact did so, and thus acquired an English domicil.

It appears that the marriage was not a happy one. One child, a daughter, one of the plaintiffs, was born of the marriage on March 1, 1879. On August 4, 1880, the testatrix left her husband's house and declined to resume cohabitation. In November, 1891, the husband instituted proceedings in Scotland for declarator that the testatrix had been guilty of wilful and malicious non-adherence to and desertion of the appellant for the statutory period of four years, and for decree of divorce a vinculo, and declarator to the effect that he was free to marry again, and that the testatrix had forfeited all the privileges of a lawful wife, including her claims as a widow, whether legal or conventional. The husband's proceedings failed before the Lord Ordinary; and on a reclaiming note this decision was adhered to by a majority of the Second Division.

The husband then appealed to the House of Lords, and the proceedings are reported in *Mackenzie* v. *Mackenzie*. (1) The husband's appeal failed and was dismissed. It appeared that the wife had left the husband because of conduct on his part causing her mental distress sufficient to interfere with her restoration to health, and because of menaces by him sufficient to create in her a well-founded apprehension of physical restraint culminating in an act of violence against her person. In these circumstances, it was held that the wife had reasonable cause for leaving her husband's house and for refusing to return to it, and that there was a good defence to the proceedings by the husband. The point was raised whether any conduct short of a matrimonial

(1) [1895] A. C. 384.

offence, adultery or sævitia, would be a sufficient defence to the husband's proceedings; but the point was not decided, as it was established that there was sævitia on the part of the husband, within the meaning of the law of Scotland, such as to justify a separation.

Lord Herschell L.C. so expressed himself. Lord Watson said that the circumstances of the case appeared to him to afford ample grounds for holding that the wife after she left her husband's house in August, 1880, would have been entitled to a decree of separation if she had chosen to insist for it. Lord Ashbourne said that he had arrived at the clear conclusion that the circumstances would have entitled the wife to ask for a judicial separation and therefore in any view of the law to resist a suit for adherence. Lord Ashbourne added that the appellant (the husband) had argued that a wife could not succeed in a defence to an action for adherence unless upon proof that would support a demand by her for judicial separation, but that the conclusion at which he had arrived on the facts rendered it unnecessary to decide the point. Lords Macnaghten and Morris concurred.

Having regard to the expressions of opinion to which I have referred that the wife, if she had demanded it, would have been entitled to a decree of separation, it has been argued in the present case that the wife must be considered as having established, by judicial proceedings, her right to such a decree, and must be regarded as if she had obtained such a decree; and upon that footing it is insisted that it was open to her to acquire a separate domicil independent of her husband, and that she did, in fact, acquire an English domicil. It must be observed, however, that the wife never obtained or applied for any decree of separation; she never lost or abandoned her right to insist on her husband's receiving her to partake of his bed and board, if she had been minded so to do; and it would be a singular result if the wife was entitled, at any time she pleased, to insist upon returning to her husband, and was also entitled at the same time, if she pleased, to establish a domicil different from that of her husband.

The question whether a wife who has obtained a decree for judicial separation can acquire an independent domicil was left

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open by the House of Lords in *Dolphin* v. *Robins*. (1) In that case the matrimonial domicil was English, and the husband having committed adultery in Scotland, the wife obtained a divorce from the Court in Scotland, and married a Frenchman, according to the forms required by Scottish and by French law, and went with him to his domicil in France. It was held that the decree of divorce of the Court in Scotland was invalid, as there was not any real Scottish domicil, and that the decree had no effect either as a divorce a vinculo or a mensa et thoro. The further question was then argued whether the circumstances were such as rendered the wife capable of gaining for herself a domicil. It was urged that as the facts then stood, both parties having committed adultery, neither of them could sue for a divorce, nor could either party insist on a restitution of conjugal rights, and that it followed under those circumstances that the woman could obtain a domicil of her own. But their Lordships unanimously negatived that view. Lord Cranworth said it would be unnecessary and improper to pronounce an opinion as to whether a wife who had by judicial sentence obtained a decree a mensa et thoro could obtain an independent domicil, as in the case before the House there was not any judicial sentence of divorce a mensa et thoro. He added (2): "For, whatever might have been the case if such a decree had been pronounced, I am clearly of opinion, that, without such a decree, it must be considered that the marital rights remain unimpaired." He then proceeded as follows: "It was, indeed, argued strongly, that here the facts shew, that the husband never could have compelled his wife to return to him. The allegation of the appellant, it was contended, contains a distinct averment that the husband had committed adultery; and this would have afforded a valid defence to a suit for restitution of conjugal rights, and so would have enabled the wife to live permanently apart from her husband, which, it is alleged, he agreed she should be at liberty to do. But this is not by any means equivalent to a judicial sentence. It may be that where there has been a judicial proceeding, enabling the wife to live away from her husband, and she has, accordingly, selected a home of her own, that home shall, for purposes of

(1) 7 H. L. C. 390. (2) 7 H. L. C. 417.

succession, carry with it all the consequences of a home selected by a person not under the disability of coverture."

This passage was much relied upon by the defendants, who insisted that in the present case there had been "a judicial proceeding enabling the wife to live away from her husband," and reliance was placed upon the passages in the speeches in the House of Lords in *Mackenzie* v. *Mackenzie* (1) to which I have already referred in support of this view. But in my opinion the whole context shews that Lord Cranworth was here referring to a judicial proceeding ending in a sentence of divorce a mensa et thoro, and not to proceedings in which no sentence was pronounced, but which failed by reason of the misconduct of the spouse who instituted them.

On the next page Lord Cranworth added (2): "I have already observed, that the decision in this case will be no precedent where there has been a decree for judicial separation; and, before quitting the subject, I should add, that there may be exceptional cases to which, even without judicial separation, the general rule would not apply, as, for instance, where the husband has abjured the realm, has deserted his wife, and established himself permanently in a foreign country, or has committed felony and been transported. It may be, that in these and similar instances the nature of the case may be considered to give rise to necessary exceptions."

Lord Kingsdown said (3): "One thing only I am anxious to guard against. If any expressions of my noble and learned friend have been supposed to lead to the conclusion that his impression was in favour of the power of the wife to acquire a foreign domicil after a judicial separation, it is an intimation of opinion in which at present I do not concur. I consider it to be a matter, whenever it shall arise, entirely open for the future determination of the House."

Lord Campbell L.C. said (4): "There was no such separation as would even amount to a divorce a mensa et thoro. I am quite clear, therefore, that this lady was not in a situation to acquire a new domicil separate from that of her husband."

(1) [1895] A. C. 384.
(2) 7 H. L. C. 418.
(3) 7 H. L. C. 420.
(4) 7 H. L. C. 423.

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In my opinion, that case established that a married woman is incapable of acquiring a separate domicil where there has not been any decree of judicial separation, or its equivalent, divorce a mensa et thoro, except, possibly, in the exceptional cases referred to by Lord Cranworth. I therefore determine that the testatrix was domiciled in Scotland at her death.

The wife then being domiciled in Scotland, the husband claims that under the Married Women's Property (Scotland) Act, 1881, s. 6, he is entitled to a share of her movable estate, notwithstanding any disposition of it by her will; and the daughter also claims, under s. 7, a right of legitim. [His Lordship read ss. 6, 7, 8.] This statute was not passed until four years after the marriage of the parties; but it was held by the House of Lords in *Paterson* v. *Poë* (1) that s. 6 applies to marriages entered into before the passing of that Act as well as to those contracted after that date.

The defendants resist the claim on the ground that s. 8 provides that the Act shall not affect any contracts made between married persons before marriage; and that the property of which the deceased died possessed was separate estate or savings of separate estate, which, by the terms of the marriage contract, the wife was to be at liberty to dispose of by will.

Upon this point I may summarize the contentions of the respective parties in this way. The plaintiffs not only accept the view that the property is the wife's separate estate, but insist upon it, as being the foundation of their claim. They say that the jus mariti being excluded, and the property being the separate property of the wife within the meaning of the law of Scotland, they are entitled to jus relicti and legitim out of it; and that the right of disposition conferred by the property being settled to the wife's separate use must be subject to the rights of those who, under the law of the domicil, are entitled to share in the property of the deceased.

On the other hand, the defendants contend that, having regard to the circumstances of this case, the wife's settlement, under which the property comes, must be governed by the law of England; that the wife had, by contract with her husband, a

(1) 8 App. Cas. 678; 10 R. (H. L.) 73.

power to dispose of the property by will, as much as if a power had been inserted in the settlement in so many words; and that the only part of this settled property on which the law of the domicil can operate is such part (if any) as she may not have disposed of by her will; and they also say that if the settlement is governed by the law of Scotland the wife's will must still prevail, as the Act is not to affect any contracts made between married persons before marriage.

It becomes necessary now to refer to the contracts between the spouses made on the occasion of their marriage.

By a marriage contract dated June 25, 1877, in Scottish form, the husband settled a sum of 20,000*l.* payable on his death, secured, as to 10,000*l.*, on certain lands at Inverewe and Kernsary in the county of Ross, and as to the remaining 10,000*l.* on certain policies of assurance. The trusts of the 20,000*l.* were for the life-rent use of the wife should she survive her husband, with remainder to the children of the marriage. And it was thereby declared that the provisions thereby conceived in favour of the wife and children of the intended marriage should be in full satisfaction to the wife of all terce of land, half or third of movables, or other claims competent to her by and through the decease of her husband should she survive him, and also in full satisfaction to the children of all claims of legitim competent to them by and through the decease of their father.

By a marriage settlement dated the same June 25, 1877, and in English form, two sums of 10,000*l.* each, one in possession, and the other subject to the life interests therein of the lady's father and mother, were assigned to the trustees of the settlement upon trust to pay the income of the same to the wife during her life for her separate use without power of anticipation, and after her decease to the husband for his life, with remainder to the issue of the marriage, and in default of issue, if the husband should survive the wife, for such person or persons as under the statutes for the distribution of the effects of intestates would have become entitled thereto in case the wife had died possessed thereof intestate and without leaving a husband her surviving.

The indenture also contained a covenant for the settlement of any real or personal property which the wife then was, or which

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during the intended coverture she or her husband in her right should at any one and the same time and from the same source become, seised or possessed of or entitled to exceeding the value of 1000*l.* or upwards for any estate or interest whatever, in possession, reversion, remainder, or expectancy (except jewels, trinkets, ornaments, furniture, plate, pictures, prints, books, and other articles of the like nature which it was thereby declared should belong to the wife for her separate use). The trusts of this other or after-acquired property were for the wife for life with a restraint on anticipation, in like manner as the wife's funds comprised in the settlement.

By what law are these settlements to be construed and governed? The husband's settlement in Scottish form must be governed by Scottish law. It is insisted, however, that the wife's settlement must be governed by English law, and not by the law of the matrimonial domicil, which is Scottish. It is a question of the intention of the parties. As a general rule, the law of the matrimonial domicil is applicable to a contract in consideration of marriage, but this is not an absolute rule; it yields to the intention of the parties, either expressed, or to be gathered from all the circumstances of the case. In *In re Hernando* (1), where a domiciled Englishwoman married a domiciled Spaniard, it was held that the settlement by the wife in English form took effect according to English law, but the settlement contained an express declaration that the deed should take effect and be construed according to the law of England. In *In re Mégret* (2), where a domiciled Englishwoman married a domiciled Frenchman, and there was a settlement in English form of English personal property, it was held by Cozens-Hardy J. that the settlement was governed by English law, and that all the settled property passed under the will of the wife, notwithstanding the limitations imposed by French law on testamentary disposition, according to which her husband and children would have been entitled to a part of her property, notwithstanding any disposition to the contrary by the wife's will. Cozens-Hardy J. said: "Though there is no express declaration in the settlement that English law is to prevail, it seems to me that from the

(1) 27 Ch. D. 284. (2) [1901] 1 Ch. 547, 549.

circumstances under which it was executed, and the form of the settlement, that is a necessary consequence." Although the settlement made by the husband and wife respectively, in the present case, were parts of one contract of marriage, nevertheless the parts may be governed by different laws: *Chamberlain* v. *Napier* (1); *Hamlyn & Co.* v. *Talisker Distillery* (2); *In re Fitzgerald.* (3) I may also refer to my own judgment in *British South Africa Co.* v. *De Beers Consolidated Mines, Ld.* (4) (which judgment was affirmed on appeal (5)), and especially to the passage which I there cited from the judgment of Cozens-Hardy L.J. in *In re Fitzgerald* (3), which is directly applicable to the present case.

Having regard to all the circumstances of the present case, to the contemporaneous settlements—that of the husband in Scottish form, with Scottish legal terms—that of the wife in English form, with English legal terms, imposing on the wife a restraint against anticipation, a comparatively modern invention of English law, providing in certain events for the wife's property being distributed in accordance with the English Statute of Distributions, I am satisfied that all the parties to the English settlement intended that English law should govern and regulate it, and I so decide.

I gather from paragraph 16 of the first affidavit of the Lord Advocate that in his opinion a Scottish Court would take the same view.

It has certainly been the law of England, since the decision in *Taylor* v. *Meads* (6), that a married woman may dispose by will of her separate estate, without the concurrence of her husband. In that case Lord Westbury said: "The true theory of her alienation is, that any instrument, be it deed or writing, when signed by her, operates as a direction to the trustees to convey or hold the estate according to the new trust which is created by such direction."

The English settlement is a contract by the husband that the wife shall have (amongst other powers) a power to dispose by will of certain property, and although compendiously expressed by

(1) 15 Ch. D. 614, 631.
(2) [1894] A. C. 202.
(3) [1904] 1 Ch. 573, 587.
(4) [1910] 1 Ch. 354, 381—383.
(5) [1910] 2 Ch. 502.
(6) 4 D. J. & S. 597, 604.

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saying that the property shall belong to the wife for her separate use, the legal effect is the same as if all the powers given by English law to married women in respect of that property, including a power to dispose of it by will, had been written out at length in the settlement. If the effect of the provision was that the husband agreed that his wife could dispose by will of the property settled to her separate use, nothing is lost by the terms of the contract not being written out more at length in the settlement, or by omitting to insert an express provision that the wife could dispose by will of property thereby declared to be her separate property. A written contract is after all only the evidence of what the parties have agreed to, and, if I have interpreted their marriage contract correctly, the wife's rights would not be varied by her acquiring on her marriage a Scottish domicil.

Moreover, the savings made out of the income of separate estate are also separate estate, for, as the Lord Keeper expressed it, "the sprout is to savour of the root, and to go the same way": *Gore* v. *Knight* (1); and the investments of those savings are also separate estate: *Barrack* v. *M'Culloch.* (2) The result is that, by contract between the spouses as to property coming to the wife within and governed by the English settlement, the husband has agreed that the same and the savings thereof and the investments of those savings shall belong to his wife, with such powers of free and absolute disposition by will as English married women enjoy. This, in my opinion, is the result and effect of the settlement.

The rights of persons who are entitled under the law of the Scottish domicil to share in the property of the deceased are subject to the right of disposition given by the marriage contract in respect of property comprised within that contract. If the deceased had not exercised with regard to that property the power of disposition by will, but had allowed it to devolve as on an intestacy, or if she had movable property not bound by any ante-nuptial contract of her husband giving her power to dispose of it by will, then and in each case jus relicti and legitim would have attached, unless excluded by the ante-nuptial contract of

(1) 2 Vern. 535. (2) 3 K. & J. 110.

the spouses, or duly renounced or discharged according to the law and practice of Scotland.

So far I have only dealt with the property comprised originally in the English settlement, that is to say, any savings of the deceased out of the income of the 20,000*l.* thereby settled.

The wife, however, became entitled to certain further property. Under her father's will she became entitled to a capital sum of 5000*l.* which was paid to the trustees of the settlement and is held upon the same trusts as the 20,000*l.* originally settled. There is therefore no distinction between the savings from these two funds. But in addition under her mother's will, and the exercise thereby of a power of appointment, the wife became entitled to a life interest in three sums of 20,000*l.*, 5000*l.*, and 5000*l.* for her separate use restrained from anticipation, and she had a limited power of appointment as to one of the sums of 5000*l.* Under her brother's will she became entitled to a life interest in 50,000*l.* for her separate use restrained from anticipation, and also to certain powers of appointment over that amount, and over the 20,000*l.* No question was raised before me with reference to any funds appointed, but it was contended that the life interest in the several sums of 20,000*l.*, 5000*l.*, 5000*l.*, and 50,000*l.*, making together 80,000*l.*, was conferred upon the wife, not by the husband, but by third parties, and that, where the separate use is imposed by third parties, the savings of income arising from those funds are not within the settlement, and further that if the life interest in the 80,000*l.* is caught by the settlement, then all sums so paid for interest ought to have been invested and the income only paid to the tenant for life under the settlement.

In my opinion neither of these contentions is well founded. The covenant to settle the other and after-acquired property of the wife is in a common form, and appears to have been taken from Davidson's Conveyancing, 3rd ed. vol. iii. pt. ii. pp. 728—730. The trust for conversion of the after-acquired properties excludes "an annuity or annuities or other estate or interest for the life of the wife." The life interest of the wife in the 80,000*l.* is therefore not to be converted. The settlement then provides that "the said trustees or trustee shall pay and apply any annuity or

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annuities and the income of any other estate or interest for the life of the wife"—that is to say, the income arising from the 80,000*l.*, as the wife has an estate or interest for her life in that 80,000*l.*, and the dividends or interest arising during her life form the income of that estate. The trustees are to pay that income "to the persons for the purposes and in manner to whom and for and in which the interest dividends and income of the said trust premises the trusts whereof are lastly hereinbefore declared shall or would for the time being be applicable under the same trusts"—that is to say, to the wife for her separate use without power of anticipation.

With regard to the other point that the savings from the income of the 80,000*l.* are not within the settlement, I have already pointed out that this income is in terms within the settlement, although not within the trust for conversion. Moreover the husband has by the settlement contracted that all this after-acquired property shall belong to his wife for her separate use, and it is by the contract contained in the marriage settlement that he and the issue are bound. It matters not that the third parties, from whom the interest is derived, have also provided that the wife shall take for her separate use. If they had not done so, the property would nevertheless be bound by the husband's contract. And again the restraint against anticipation does not further affect the matter. As each instalment of income fell due and was paid to the wife, she was entitled to it, as against her husband, for her separate use, by virtue of his own contract. And, as I have already said, in respect of everything within the settlement and governed by the husband's contract he has agreed that she may dispose of it by will, this being an incident of English separate estate.

I wish, however, to state quite plainly that my decision that the wife is able to dispose by will of all the savings of her income is founded upon the marriage contract, whereby the husband agreed that she should be at liberty to do so—that is, agreed that all income and the savings thereof should be her separate property with the incidents attached thereto by the law of England. If during the coverture property had been given to or otherwise acquired by the wife for her separate use, which was

not within the settlement, for instance property accruing at one and the same time and from the same source not exceeding 1000*l.* in value, and not being jewels, trinkets, &c., then I apprehend that, this property being the separate property of a married woman domiciled in Scotland, the husband would have been entitled to jus relicti and the children to legitim in respect thereof, unless excluded by the ante-nuptial contract of the spouses or duly renounced or discharged according to the law and practice of Scotland.

This question does not, however, really arise in these proceedings, as I have no evidence whatever of any property coming to or devolving on the deceased other than that caught by her settlement. As was said by the Lord Keeper in *Gore* v. *Knight* (1), "It appears not, that any other estate came afterwards to the lady; and therefore what she died possessed of is to be taken to be the separate estate, or the produce of it, unless the contrary had been made appear."

If, however, contrary to my opinion, the wife's settlement is governed by Scottish law, the effect of this is, according to the opinion of the Lord Advocate, as stated in paragraph 15 of his first affidavit, to give to the wife the enjoyment of the premises with all the incidents then known—that is, known at the date of the settlement in 1877—to the law of Scotland in regard to married women's property as to which jus mariti and jus administrationis had been excluded, including as one of those incidents the power of testamentary disposition over savings of separate income and other property belonging to her for her separate use to whomsoever she should think fit, excluding, if she thought fit, her husband and children. I do not gather from the opinion expressed by Clyde that he differs from the Lord Advocate on this point. The Scottish lawyers, indeed, are agreed that at the date of the settlement and until 1881 the wife would have been entitled according to Scottish law to dispose of all her separate property by will to the entire exclusion of her husband and children. Clyde expresses himself thus (paragraph 6 of his first affidavit): "She could dispose of the same inter vivos as well as mortis causa without her

(1) 2 Vern. 535.

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husband's consent and in the same way as if she had been a single woman. Such property was properly described as her 'separate estate' in the law of Scotland."

The Scottish lawyers differ, however, on the next point, and their difference is as follows. The Lord Advocate's view is that if the Act of 1881 is held to restrict the right of complete testamentary disposition, by the wife, over the property comprised in the wife's settlement, then her rights under the marriage contract would be "affected" by the Act. But s. 8 provides: "This Act shall not affect any contracts made . . . . between married persons before . . . . marriage."

Clyde's view is thus expressed in paragraphs 4 and 5 of his second affidavit: "Further if paragraph 23 of the said affidavit of Alexander Ure means that the said indenture of settlement dated June 25, 1877, would be 'affected' within the meaning of s. 8 of the Married Women's Property (Scotland) Act, 1881, by sustaining the husband's claim to jus relicti or the children's claim to legitim, so as to require or involve that these rights or either of them should be held to be defeated by or in consequence of the said indenture of settlement, then I disagree with it. I say that the said indenture of settlement contains no stipulations protecting the wife's interests in the income thereby provided to her or in her savings derived therefrom except the exclusion of the jus mariti and right of administration. But this exclusion is not only not adverse to the husband's and children's claims but is a necessary condition of their enforceability as I have explained in paragraph 2 hereof."

Paragraph 5. "Three cases have occurred in which the special terms of marriage contracts (dated prior to 1881) have been pled as defeating the husband's claim to jus relicti under s. 8 of the Married Women's Property (Scotland) Act, 1881. But in those of the three in which the special terms of the marriage contract were pled successfully, the ultimate disposal of the wife's estate according to her own disposition or in some way which would be defeated by sustaining the husband's claim had been made an express pars contractus of the settlement. In no case of which I am aware has it been held or suggested that the preservation to the wife of separate estate by the mere exclusion from it under

ante-nuptial contract or otherwise of the husband's jus mariti and right of administration placed such separate estate beyond the reach of the husband's claim to jus relicti or the children's claim to legitim. I append a note of the three cases referred to, *Simons' Trustee* v. *Neilson* (1); *Buntine* v. *Buntine's Trustees* (2); *Murray's Trustees* v. *Murray*. (3)"

In the present case it was in my opinion a pars contractus that the wife should be entitled to dispose by will of all her separate estate comprised within the wife's settlement just as much as if a lengthy provision to that effect had been set out in the document itself, and if that right were to be held restricted or limited by the Act of 1881 the marriage contract would in my judgment be "affected" by the Act. The result is that in my judgment the right of the testatrix to complete testamentary disposition in respect of property comprised in or subject to the settlement was in any case preserved to her by s. 8 of the Act of 1881, even if the settlement is to be governed by the law of Scotland.

A further question was raised. The right conferred by ss. 6 and 7 of the Act of 1881 to jus relicti and legitim in a woman's movables is given by reference to the share and interest which a widow and children respectively take in a deceased husband's and father's estates "according to the law and practice of Scotland, and subject always to the same rules of law in relation to the nature and amount of such share and interest, and the exclusion, discharge, or satisfaction thereof as the case may be." The Lord Advocate is of opinion that the jus relicti and legitim are "excluded" in the present case by the ante-nuptial contract. Clyde said (paragraph 6 of his second affidavit): "In my opinion by the law of Scotland the said indenture of settlement is ineffectual to defeat either the jus relicti of the surviving husband or the legitim of the surviving child." Having regard, however, to the fact that the other points upon which I have already expressed an opinion are sufficient to dispose of the case, as there is no evidence of any property not comprised in the wife's settlement,

(1) 18 R. 135. (2) 21 R. 714.
(3) 3 F. 820.

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I do not propose to subject the parties to the delay and expense of sending a case for the opinion of the Court of Session in Scotland on this last-mentioned point, which really does not arise. Upon the summons there must be a declaration that the deceased died domiciled in Scotland, and no other order. The plaintiffs must pay the costs of the summons except so far as increased by the defendants disputing the Scottish domicil.

Solicitors: *Monier-Williams, Robinson & Milroy; Farrer & Co.*

G. R. A.

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March 17.

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[1911 C. 24.]

Lands Clauses Acts—Notice to Treat not served on Mortgagee—Possession taken by Promoters—Subsequent Notice to Treat to Mortgagee—Tramways—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *ss.* 18, 68, 84, 85, 124.

The London County Council was empowered by statute to reconstruct certain tramways and to acquire lands for the purposes of the statute, which incorporated the material provisions of the Lands Clauses Act, 1845.

Land required for the purposes of the council's Act belonged to E., to whom the council gave notice to treat under s. 18 of the Act of 1845. In answer to inquiries whether the land was mortgaged C. gave the dates of two mortgages on the property and the amounts thereby secured, but declined to disclose the names of the mortgagees. The council proceeded under the notice to treat and a jury assessed the compensation. C., one of the mortgagees, refused to be bound by the jury's finding, and the council thereupon served her with notice to treat under s. 18 of the Act of 1845. C. then brought an action against the council and E., alleging that the council had taken possession of the land, and claiming an account of what was due under her mortgage, damages for injuries to the property, and an injunction. The council then gave C. notice to proceed to assess the compensation payable under the notice to her to treat, and she applied for an interlocutory injunction to restrain the council from proceeding to summon a jury or otherwise proceeding on their notice to her to treat:—

Held, that, assuming the council had taken possession of the property, that fact did not preclude them from their statutory right to give notice to treat to C., and that the injunction must be refused.

By the London County Council (Tramways and Improvements) Act, 1909 (9 Edw. 7, c. lxxv.), the London County Council was

empowered to construct and work certain new tramways and to alter and reconstruct certain existing tramways and to make certain street improvements, including the widening of certain streets, and to acquire lands for the purposes of the Act. Sect. 3 of the Act was as follows: "The following Acts and parts of Acts (that is to say): The Lands Clauses Acts; and section 3 (interpretation of terms) and Parts II. and III. of the Tramways Act, 1870; as far as the same are applicable for the purposes of and not varied by or inconsistent with this Act are hereby incorporated with and form part of this Act: Provided that sections 127 and 133 of the Lands Clauses Consolidation Act, 1845, shall not apply in the case of any lands purchased by the council under the powers of this Act: Provided also that notwithstanding anything contained in the Lands Clauses Consolidation Act, 1845, any claim for compensation under this Act or any Act incorporated herewith by any person having or in respect of any interest in the lands in respect of which compensation is claimed not greater than that of a lessee or tenant for any term of which not more than eighteen months remain unexpired at the time when the claim is made shall be determined by justices in the manner provided by section 121 of the Lands Clauses Consolidation Act, 1845."

Sect. 6 empowered the council to reconstruct certain tramways in Woolwich Road and other streets in the parishes of Greenwich, Charlton, and Woolwich, or one of them.

Sect. 10 provided that certain parts of the tramways should not be used until the streets through which they ran had been widened, and by s. 22 certain widenings of Woolwich Road in the parish of Charlton were authorized.

In order to effect one of these widenings the council were empowered to acquire four cottages, being Nos. 583, 585, 587, and 589, Woolwich Road, in the parish of Charlton.

On November 1, 1909, the council served on Miss Ellis, the owner of the cottages, a notice to treat in respect of the same under s. 18 of the Lands Clauses Act, 1845.

In answer to an inquiry whether the property was mortgaged Miss Ellis replied that there were two mortgages on it, one dated April 17, 1902, for 650*l.*, and the other dated April 18,

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1902, for 500*l.*, but she declined to give the names of the mortgagees.

A sealed offer of 910*l.* having been made for the property and refused, the compensation was assessed by a jury at the sum of 820*l.*

Miss Laura Cooke held a second mortgage of April 18, 1902, on the property, and, as she declined to accept the jury's finding, the council, on May 17, 1910, served her with notice to treat.

On January 4, 1911, she commenced the present action against the council and Miss Ellis, claiming an account of what was due under her mortgage, payment of the amount found due, all necessary accounts and inquiries, damages for alleged injury to and partial demolition of the property by the council, and an injunction.

On February 23, 1911, the council gave Miss Cooke notice to proceed to assess the compensation payable under the notice to treat of May 17, 1910; and the plaintiff now moved before Parker J. for an injunction until the trial restraining the council from issuing any warrant to the sheriff to summon a jury and from acting on that notice to treat.

It was in dispute whether the council had actually taken possession of the property, but his Lordship assumed for the purposes of the motion that possession had been taken.

C. H. C. Noad, for the plaintiff. The council has taken possession of the property without regard to the rights of the mortgagees but with knowledge that there were mortgages on the property. The mortgagees are not bound by the finding of the jury on the notice to treat given to the mortgagor, and the council, having taken possession, cannot now give the plaintiff notice to treat, but must go outside the Lands Clauses Act, 1845, and pay off the plaintiff's mortgage: *Martin* v. *London, Chatham and Dover Ry. Co.* (1) That case shews that the plaintiff is not bound to proceed under s. 68 of the Act of 1845, and s. 124 does not apply, inasmuch as the council cannot be said to have omitted to purchase the plaintiff's interest by mistake. The council could not lawfully take possession under s. 84 of the Act of 1845 until they

(1) (1866) L. R. 1 Ch. 501.

had paid the plaintiff compensation, or had given security under s. 85. If the council has not lost its statutory powers, it should be restrained from exercising them on the principles laid down in *Stretton* v. *Great Western and Brentford Ry. Co.* (1) [He also referred to ss. 38, 54, 89, 91, 108, and 110 of the Lands Clauses Act, 1845.]

Romer, K.C., and *Attwater*, for the London County Council. We deny that we have taken possession, but if we have, there is nothing in the Act of 1845 which says that the fact of taking possession precludes promoters from exercising their statutory powers. In *Martin* v. *London, Chatham and Dover Ry. Co.* (2) Lord Cranworth L.C. points out that no steps had been taken to acquire the mortgagees' interest, and says that the company ought to have given notice under s. 18 of the Act of 1845. That is exactly what the council have done in the present case. [They also referred to *Ranken* v. *East and West India Docks and Birmingham Junction Ry. Co.* (3)]

C. H. C. Noad in reply.

PARKER J. The short history of this case, as brought before me on the plaintiff's motion, is as follows. Under the London County Council (Tramways and Improvements) Act, 1909, the London County Council have power to acquire certain lands, and among others the premises known as 583 to 589 (odd numbers), Woolwich Road, in the parish of Charlton, in the county of London. At the time of the passing of the Act those houses belonged to the defendant Edith Eleanor Clara Ellis, but were subject to two mortgages, the first mortgage being for 650*l.* and the second for 500*l.* The council in the usual way under the powers of the Act of 1909, which incorporated certain provisions of the Lands Clauses Consolidation Act, 1845, served Miss Ellis with a notice to treat, and apparently they were aware at the time that the property was subject to the two mortgages, and did not insist upon the names of the mortgagees being disclosed. Miss Ellis had expressly refused to disclose the names and contented herself with giving the amounts which were due on the mortgages. I

(1) (1870) L. R. 5 Ch. 751. (2) L. R. 1 Ch. 501, 505.
(3) (1849) 12 Beav. 298.

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suppose the reason of that was that the council thought it might be possible that the amount of compensation would be sufficient to pay off the mortgages in full, in which case no difficulty would have arisen. However, the council followed the procedure pointed out by the Lands Clauses Consolidation Act, 1845, against Miss Ellis only, without serving notice to treat on the mortgagees. Ultimately on March 8, 1910, a verdict of a jury was given which assessed the compensation at 820*l*. Meanwhile the council had desired to enter into possession of the property, and had qualified themselves to do so by paying into Court a certain sum assessed in the manner provided by s. 85 of the Act of 1845 and giving a bond to Miss Ellis. All those proceedings were absolutely ineffective as against the mortgagees and only bound Miss Ellis and the council. There is a dispute whether after the date when the council were entitled as against Miss Ellis to make an entry they did enter or not. I will assume, for the purposes of this case, that they did enter, that being the aspect of the case which is most favourable to the plaintiff who is moving before me. On March 17 the plaintiff gave notice that she was not bound by the proceedings before the jury and would not be bound by them. That was not unnatural, because the total amount assessed by the jury was not sufficient to pay off the plaintiff's second mortgage. Subsequently nothing appears to have been done for some time. The plaintiff says that the county council continued in possession, and the county council say they did not, but assuming that they did, they remained in possession lawfully as against Miss Ellis, and practically they were in the same position as if Miss Ellis, the mortgagor, being in possession of the mortgaged property, had put them in possession. They may or may not have done (I have not gone into the evidence on this point) anything which would amount to waste by a mortgagor in possession and which would have been restrained in equity, but if they did, no proceedings were taken by the mortgagees to restrain any action on their part, nor did the plaintiff do anything by way of enforcing her security until January in this year, although on May 17, 1910, she had been served by the council with a notice to treat under s. 18 of the Act of 1845 in the usual way. The writ in this action was issued early

in January, and on February 25 last the council gave notice to proceed to assess the compensation under the notice to treat which they had given on May 17, 1910, before a special jury. Thereupon the plaintiff launched this motion in order to restrain the council from proceeding, pending the trial of this action, with the statutory process for determining the amount of compensation which is to be paid so far as the mortgagees are concerned.

The case against the council is put in this way. It is said that their conduct has somehow or other disqualified them in equity from proceeding to enforce their statutory powers. I am not aware of any case where, on equitable grounds such as those suggested in this case, any company has ever been restrained from exercising its statutory power, nor can I see, on the true construction of the Lands Clauses Consolidation Act, 1845, how the council can be said to have lost the statutory powers which they certainly once had. I understand the case is put in two ways; first, that the Act of 1845 does not apply and that they have lost their powers, and, secondly, that in equity they ought to be restrained from exercising their powers if they have not lost them. To me it seems reasonably clear that under s. 18 the mortgagees ought originally to have been served, and therefore that all the proceedings in the absence of the mortgagees were without prejudice to their rights and did not bind them in any way. But as soon as it was ascertained that the mortgage money would not be paid off because the amount assessed by the jury was so small, it became material to bind the mortgagees, and thereupon it appears to me the proper course was to serve a notice to treat on the mortgagees under s. 18 of the Act of 1845 and to proceed against them in the ordinary way. That was done, and the only negligence which can be attributed to the council is their delay in proceeding in due course to have the compensation assessed. I do not, however, think that is really material, because the plaintiff herself could have had the compensation assessed if she had so chosen. It does not appear to me that the taking of possession as against the mortgagor under s. 85 alters the rights of the council in any respect whatsoever. It puts them in the position of having taken possession with the consent of the

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mortgagor, but does not give them any further rights. It does not prejudice the plaintiff on the one hand, nor does it really deprive the council of any rights they have on the other hand. Nor again do I think that the subsequent sections of the Act which were quoted to me, and in particular s. 124, have any application at all. Sect. 124 has clearly no application, because there has been no inadvertence or mistake. What was done by the council was done deliberately, and the fact that they deliberately in the first instance only chose to proceed against the mortgagor does not, in my opinion, deprive them of their right of subsequently proceeding, if they so think fit, against the mortgagees. It appears to me, therefore, that they retain their statutory rights and that there has been no conduct on their part which raises an equity against them so that I can restrain them from exercising their statutory rights. The only suggestion is that since they entered into possession the property has deteriorated, and compensation can now not be properly fixed, because the jury will see the property in a state of repair or otherwise which it was not in when compensation ought to have been assessed; but as against that one has to remember that the mortgagees could at any time have instituted an action; they could at any time have moved for a receiver; they could at any time have moved to restrain the council, if the council were in possession, from committing any acts which would amount to waste. Therefore, if anything has been done in the meantime to the prejudice of their interests, they are certainly as much to blame as the council is to blame, the council being lawfully in possession as against the mortgagor, and the mortgagor's possession being a perfectly good possession until the mortgagees exercise their rights.

In my opinion, therefore, the motion fails and should be dismissed.

Solicitors for plaintiff: *Morse Hewitt, Farman & Walter.*
Solicitor for the council: *Edward Tanner.*

F. E.

In re LESLIE'S HASSOP ESTATES.

[1910 L. 1359.]

EVE J.
1911
March 24.

Trustees—Public Trustee—Appointment by Court—Sole Trustee—Settlement—Provision as to Number of Trustees being not less than three—Trustee Act, 1893 (56 & 57 *Vict. c.* 53), *ss.* 10, 25—*Public Trustee Act*, 1906 (6 *Edw.* 7, *c.* 55), *s.* 5, *sub-ss.* 1, 3—*Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 39, 45.

The Court has express jurisdiction, under s. 5 of the Public Trustee Act, 1906, to appoint the Public Trustee sole trustee of a settlement, although it contained a provision that the trustees should not at any time be less than three.

Semble, under the combined effect of s. 10 of the Trustee Act, 1893, and s. 5 of the Public Trustee Act, 1906, the donee of the power in a settlement containing such a provision could himself appoint the Public Trustee to be sole trustee.

In cases where such an appointment has been made under the Court's statutory power of appointing new trustees, the settlement must be read as authorizing the payment to a sole trustee of capital moneys under the Settled Land Acts.

Notwithstanding the absence of any express statutory enactment enabling the Public Trustee to hold land or take possession of personal property except as provided in s. 3 of the Act of 1906, it must be implied that he has full power, when appointed, to possess himself of the trust property, whatever its nature.

Semble, under s. 25 of the Trustee Act, 1893, the Court has jurisdiction to appoint two trustees, or even a sole trustee, of a settlement, in disregard of the settlor's direction as to the minimum number being three.

ADJOURNED SUMMONS.

The applicants on the summons were Philip John Canning Howard and Frederick Anthony Trevor, the two surviving trustees of a settlement dated November 22, 1867. By that settlement Colonel Charles Leslie settled certain estates in the county of Derby, known as the Hassop settled estates, from and after his decease, to the use of six trustees for a term of 500 years upon the trusts therein declared, and after the termination of the term and subject thereto to the use of his son Charles Stephen Leslie, the first respondent, during his life, with remainder to the use of every son of C. S. Leslie, severally and successively in tail male, with divers remainders over. And the settlement contained a provision that if the trustees for the time being or any of them should die, or desire to be discharged

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from the trusts, it should be lawful for Charles Stephen Leslie, during his life, and after his decease for the surviving or continuing trustees or trustee, by any writing as therein mentioned, to appoint any one or more person or persons to be trustee or trustees in the place of any so dying, or desiring to be discharged, "so nevertheless that the whole body of trustees should not at any time be less than three, or be made to exceed six in number."

By his will, dated December 9, 1867, Charles Leslie directed his trustees and executors therein named to deliver certain valuable pictures, furniture, china, and other chattels to the trustees of the Hassop settlement, to go as heirlooms, and be held in trust for the person entitled for the time being under the Hassop settlement to the possession of his mansion of Hassop Hall. Charles Leslie died on January 10, 1870. His son Charles Stephen Leslie thereupon became tenant for life under the Hassop settlement, and was in possession of the heirlooms. Under orders of the Chancery Division of the High Court of Justice various capital sums had from time to time been applied by the trustees of the settlement in payment of certain works of improvement on the settled property. On May 28, 1908, George Matthews Arnold, one of the three existing trustees of the settlement, died, and the two surviving and continuing trustees who had been appointed in 1877 desired to be discharged. The tenant for life was alleged by the trustees to be unable or unwilling to appoint new trustees. On July 1, 1910, the surviving trustees issued an originating summons asking for a declaration that they were the persons entitled under s. 10, sub-s. 1, of the Trustee Act, 1893, to appoint at least three other persons to be trustees of the Hassop settlement, and of the chattels settled by the will of C. Leslie, in their place, by reason of C. S. Leslie, the tenant for life, being unwilling to nominate trustees.

On February 3, 1911, Eve J. made an order that "it be referred to the Master in chambers to appoint three trustees (or the Public Trustee) trustees or trustee respectively of the above-mentioned indenture of settlement."

Upon the appointment for drawing up the order, after communications with the Public Trustee, it was questioned

whether there was jurisdiction in the Court to appoint the Public Trustee sole trustee under the circumstances of the case. The matter was accordingly mentioned in Court again by the direction of the judge.

Edward Beaumont, for the tenant for life. The Public Trustee may be appointed sole trustee of any settlement, by virtue of s. 5, sub-s. 1, of the Public Trustee Act, 1906. That overrides the former provisions in the Act of 1893. The tenant for life here has no objection to the appointment of the Public Trustee. Sect. 10 of the Act of 1893, providing for the appointment of new trustees by the person or persons nominated by the instrument, and which provides against a trustee being discharged, unless there was originally only one trustee or unless there will be at least two trustees to perform the trust, is not the section under which the order of February 3 was made. But s. 25 of this Act provides that the Court may appoint new trustees, and that section contains no restriction like that in s. 10, sub-s. 5. Then in the Public Trustee Act, 1906, s. 5, sub-s. 3, there is a provision that "the Public Trustee shall not be so appointed either as a new or additional trustee, where the will, settlement, or other instrument creating the trust or duty contains a direction to the contrary, unless the Court otherwise order." So the Court can override an express prohibition contained in the settlement. The order, therefore, as drawn, is in proper form.

A. Lockyer Ingpen, for the continuing trustees of the settlement. There are various difficulties in appointing the Public Trustee sole trustee. First, there is a clear contrary intention expressed in the settlement that there shall not be less than three trustees. By the Public Trustee Act, s. 5, sub-s. 1, the Public Trustee can only be appointed where it would be possible to appoint a private trustee, and sub-s. 3 shews that he ought not to be appointed where the settlement or will contains a direction to the contrary. In effect, the settlor has said "I do not wish to have a sole trustee": Carson's Real Property Statutes, 2nd ed. p. 781.

Secondly, the Public Trustee cannot be a trustee for the purposes of the Settled Land Act, 1882, which requires that

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capital moneys shall be paid to not less than two trustees, unless the settlement authorizes the receipt by one trustee: ss. 39 and 45 of the Act.

[EVE J. Must you not read in the provisions of the Public Trustee Act?]

There is nothing in the Public Trustee Act which refers to the Trustee Act of 1893 or the Settled Land Act, 1882.

Thirdly, I submit there is no repeal of either the Trustee Act, 1893, or the Settled Land Act, 1882, either express or by implication, in the Public Trustee Act, 1906.

There must be an intention to repeal or override the provisions of a sufficient statute: *Hill* v. *Hall* (1); *Great Western Ry. Co.* v. *Swindon and Cheltenham Extension Ry. Co.* (2), where Lord Bramwell says "We ought not to hold a sufficient Act repealed, not expressly as it might have been, but by implication, without some strong reason."

Lastly, there is no express provision in the Public Trustee Act, 1906, which empowers the Public Trustee to hold lands or personal chattels. In an Act passed for a somewhat similar purpose, the Treasury Solicitor Act, 1876 (39 & 40 Vict. c. 18), s. 1, which constituted the Treasury Solicitor a corporation sole, there is such an express provision enabling the Solicitor to the Treasury to hold lands and personal property of every description. In fact in 1908 a licence in mortmain to hold lands was issued to the Public Trustee. There might be a difficulty in his being admitted to copyholds: Watkins on Copyholds, 4th ed. p. 299. With regard to holding personal chattels or heirlooms, it is submitted that the Public Trustee cannot hold heirlooms, being a corporation sole. The continuing trustees in the present case have acted in the trusts for twenty-five years and are only anxious to obtain a proper discharge.

EVE J. The application raises the question whether the Public Trustee can properly be appointed by the Court sole trustee of a settlement in which the settlor has inserted a provision to the effect that the number of trustees shall not at any time be less than three. In the particular case one trustee has

(1) (1876) 1 Ex. D. 411, 414. (2) (1884) 9 App. Cas. 787, 809.

recently died, and the two surviving and continuing trustees are both desirous of being discharged. The power to appoint new trustees is vested by the settlement in the tenant for life, but, for reasons upon which I need not enlarge, he has shewn himself unwilling to exercise his power, and, in these circumstances, the continuing trustees, being anxious to put matters in order, and, if practicable, to obtain their own discharge, applied, by summons, that they might be at liberty to nominate and appoint three new trustees. Upon hearing that application I made an order referring the matter to chambers with a view to the appointment of three new trustees, intimating that in the usual course the tenant for life would have the first opportunity of nominating suitable persons, and I then directed that if, within a time to be limited by the judge in chambers, the tenant for life did not nominate suitable persons, the Public Trustee might be appointed as sole trustee. Upon the appointment to settle that order, the question was raised whether the Court had any jurisdiction, in the circumstances, to appoint the Public Trustee as sole trustee. In the first place, the Public Trustee himself had expressed a doubt as to whether he would be a competent trustee in the circumstances, and, in the next place, it was suggested that the provision in the settlement as to keeping up the number of the trustees to three had not been brought to my attention when the order was made. To-day Mr. Ingpen has been good enough, on behalf of the continuing trustees, to point out certain other matters which he suggests may operate to prevent the Court making the order as proposed. I think under the combined effect of s. 10 of the Trustee Act, 1893, and s. 5 of the Public Trustee Act, 1906, the donee of the power in a settlement framed as this one is could himself appoint the Public Trustee to to be sole trustee. I agree that, having regard to sub-s. 5 of s. 10 of the earlier Act, he could not, if he were making an appointment under that Act, appoint less than three new trustees; but that sub-section must, I think, be read as qualified by s. 5 of the later Act when the appointee is the Public Trustee. But the qualification introduced into s. 10 of the Act of 1893 is not reproduced in s. 25 of the same Act, and although, as a rule, the Court never appoints less than two trustees, and, if practicable,

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in order to give effect to the wishes of the settlor, keeps up the number of trustees to the original number, I do not find anything in the Act which imposes on the Court the obligation, in exercising its power under s. 25, to keep up the number of trustees to the number fixed by the settlor. I think, therefore, as far as jurisdiction is concerned, the Court could, under the Act of 1893, appoint two trustees or even a sole trustee notwithstanding the settlor's direction as to the minimum number being three. But it is not necessary to consider the matter further from this point of view, for, under sub-s. 1 of s. 5 of the Act of 1906, the Court has express power to appoint the Public Trustee sole trustee, though the trustees originally appointed were two or more in number, and, under sub-s. 3 of the same section, power, even in cases where the instrument creating the trust contains a direction that the Public Trustee is not to be appointed a trustee thereof, to disregard that direction, and notwithstanding that direction to appoint the Public Trustee. I cannot treat the direction in this settlement that the number of the trustees is never to be less than three as a direction that the Public Trustee shall not be appointed, but even if it were so the Court could disregard it, and in this position of matters it is, I think, impossible to come to any other conclusion than this, that the Court has jurisdiction, notwithstanding the direction, to appoint the Public Trustee to be the sole trustee in the places of the one deceased and the two continuing trustees. But, it is said, the Public Trustee will under this settlement be trustee of the settlement for the purposes of the Settled Land Acts, and Mr. Ingpen has drawn attention to the provisions of ss. 39 and 45 of the Settled Land Act, 1882, which clearly contemplate the payment of capital moneys and the giving of notices to not less than two trustees. The terms of both those sections are qualified, s. 39 by the words "unless the settlement authorizes the receipt of capital trust money of the settlement by one trustee," and s. 45 by the concluding words of sub-s. 2, "unless a contrary intention is expressed in the settlement." It seems to me that in all cases to which the statutory power of appointing new trustees is applicable, that is to say in all cases where the donee of the power can either appoint under s. 10 of the Act of 1893, or

under the combined effect of that section and s. 5 of the Act of 1906, the settlement must be read as authorizing the payment—in the event of the Public Trustee being appointed—of capital moneys to a sole trustee, and as intending the giving to a sole trustee of notices. One other point to which Mr. Ingpen has called attention is the absence of any express power conferred upon the Public Trustee to hold land or to take possession of chattels or other personal property in cases other than those falling within s. 3. He suggests that in the absence of any express statutory authority in that behalf the Public Trustee cannot—except as before mentioned—hold land, or possess himself of personal estate, but were I to accede to such a suggestion I should be shutting my eyes to the whole scope and purview of the statute, and to all that the Legislature thereby clearly intended. Apart from the language of sub-s. 2 of s. 2 of the Act it follows, I think, as inseparable from the position which the Legislature contemplated would be filled by the Public Trustee under the Act, that it was intended that he should be clothed with all the rights and powers incident or attaching to such position, and I think it must therefore be implied that he has full power to possess himself of the trust property whatever its nature. The absence of any express statutory enactment to this effect is possibly due to the assumption that such implication would necessarily arise from the nature of the Act, and the purposes for which the office was established. In these circumstances I propose to direct that the order be drawn up as I originally pronounced it in February. It does not, of course, follow that in this particular case the Public Trustee will be appointed, because there is still the opportunity of nominating three suitable persons whom the judge in chambers may see fit to appoint, before it is necessary to have recourse to the Public Trustee, but, as I have been invited to express an opinion whether, in the circumstances of this case, the order ought to have been made in its original form, I thought it right to accede to the application, and to direct as I now direct, that the order be drawn up as originally pronounced.

Solicitors: *Gribble, Oddie, Sinclair, Rowlatt & Johnson; Fooks, Chadwick, Arnold & Chadwick.*

G. M.

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March 9, 13, 14; *April* 10.

BATH *v.* STANDARD LAND COMPANY, LIMITED.

[1909 B. 1302.]

Principal and Agent—Manager of Real Estates—Limited Company appointed Agent—Agreement—Construction—Charge for keeping Accounts—Company employing its Directors in the Management—Profit Costs—Salary and Commission.

By an agreement of April, 1893, a company arranged with the plaintiff to manage, develop, and realize his estates on certain terms as to remuneration, and in the course of such management employed one of its directors, who was a solicitor, to act professionally for the estates and paid his bill of costs, which included profit items; another director, who was an estate agent, to manage at a salary a business connected with the estates; another director, who was an auctioneer, to act as auctioneer on all sales of the estates at the usual commission; and gave its secretary, who was a chartered accountant, an additional salary for keeping the books of the estates, which were of a complex nature:—

Held, affirming Neville J.'s decision, that on the construction of the agreement the company were not entitled to make any charge for or in respect of the keeping of the accounts required to be kept by the company.

Held, also (dissentiente Fletcher Moulton L.J.), that the directors stood in a fiduciary relation to the company, but not to the plaintiff, and that the profit costs, salary, and commission paid to the directors in their professional capacity might be allowed in taking the accounts between the plaintiff and the company under the agreement.

Decision of Neville J., [1910] 2 Ch. 408, reversed on this point.

Kavanagh v. *Workingman's Benefit Building Society* [1896] 1 I. R. 56, discussed and disapproved.

Per Fletcher Moulton L.J.: Where a limited company undertakes the administration of a trust, the directors, as individuals, are in a different position from an ordinary agent, and are liable for matters of personal conduct inconsistent with their full knowledge of the fiduciary character of the duties which in the name of the company they have to carry out, and, consequently, in the present case the directors could not use their position as de facto administrators of a trust to profit themselves or one another.

Appeal from a decision of Neville J. (1)

The only question raised by this appeal which calls for any detailed report was whether a limited company which had undertaken the management of an estate upon certain terms was entitled to charge for the professional services of some of its

(1) [1910] 2 Ch. 408.

directors who had been employed to do some part of the management. There was also another question whether the company were entitled to charge for keeping estate accounts under a certain agreement, but as this turned on the construction of a somewhat peculiar agreement the arguments on this question are omitted.

The articles of association of the defendant company and its predecessor in title, the agreement of April 20, 1893, and the facts are given in greater detail in the report of the case in the Court below, but the following statement, part of which is taken from the judgment of the Master of the Rolls, is sufficient for the purposes of this report.

In 1893, the plaintiff was a bankrupt. He had landed properties in Kent, which he believed to be of considerable value beyond his liabilities. The Creditors' Assets Company, Limited, of which the defendant company was the successor, was a land company with very wide objects. An arrangement was made with a view to the payment of all the plaintiff's debts by means of money to be provided by the company and for vesting all his property in the company. The terms of the arrangement were contained in an agreement of April 20, 1893, clause 1 of which was as follows: "That in the event of an order of the Court being obtained confirming the said scheme so scheduled or with such variations as may be consented to by Mr. Bath and the company, the company shall, when and as soon as it shall have duly provided all moneys necessary to carry out the said scheme and the property set forth in the 2nd schedule hereto shall have been duly vested in the company by an order of the Court, proceed to manage, develop, realize or dispose of the said property as described in the 2nd schedule hereto and which is hereinafter called 'the property' in such manner as the company in their discretion shall think fit but subject to the provisions hereinafter contained and for that purpose may advance any money for the redemption or transfer of any mortgages or charges on the said property, and from time to time sell or concur with any other persons in selling the whole or any part or parts thereof either subject to or freed from any mortgages or charges thereon, and lease, let or otherwise in all respects deal with the said property in such manner as the company in their discretion shall

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think fit, and in the management, development, realization or disposal of the said property may advance any moneys for the improvement thereof and incur any costs, charges and expenses necessary or proper for the purposes aforesaid." Clauses 4 and 5 imposed certain restrictions upon the company as to the time and mode of selling portions of the property. Clause 6 entitled the plaintiff to purchase the unsold portion of the property on payment of all money remaining due to the company with interest at 6 per cent. and one third of the surplus value. Clause 7 was as follows: "The company shall at all times until such purchase if any keep proper accounts in books showing the receipt and expenditure of all moneys payable or receivable under this agreement or in connection therewith or with the property dealt with thereunder, and such books shall be produced free of charge for the inspection of Mr. Bath or his agent at the company's office or at their solicitors or accountants office in London at all reasonable times on the reasonable request of Mr. Bath or his authorized agent, who shall thereupon be entitled to take copies thereof or extracts therefrom, and the company will on demand deliver to Mr. Bath at his expense copies of all such entries and accounts." Clause 9 was as follows: "Two separate accounts shall be kept by the company, one in respect of income, the other in respect of capital, and Mr. Bath shall be entitled within one month after the end of each three months from the date of this agreement to one-third of any profit if any arising on such income account and the company shall be entitled to retain the remaining two-thirds towards the principal moneys from time to time remaining due to them, but any loss on any income account shall first be made up out of any profit on the following income account."

In accordance with this agreement the company duly provided the plaintiff with the necessary funds to pay his creditors, and thereupon his bankruptcy was annulled, and the property comprised in the agreement was duly vested in the company, who thenceforth held and proceeded to deal with the same upon the terms of the agreement.

In 1905, the company was reconstructed under the name of the defendant company, who took over all the assets, contracts,

liabilities, and obligations of its predecessors, and continued to manage the plaintiff's estates under the agreement of April 20, 1893.

The directors and secretary of the old company became on its reconstruction the directors and secretary of the defendant company.

Quarterly accounts were sent regularly to the plaintiff, but he did not agree them, and eventually he brought the present action against the company claiming that the accounts might be taken under the directions of the Court on the ground that they contained improper charges.

It appeared that one of the directors, a Mr. May, was a solicitor and a member of the firm of May, Sykes & Co., and his firm were employed professionally by the defendant company in matters connected with the estates, and their bills of costs, which contained profit items, were paid by the company. Mr. Corke was an estate agent and surveyor and was employed by the defendant company at a salary of 200*l.* per annum to manage certain sand and gravel pits comprising part of the estates, and the business in connection with these pits occupied a large portion of his time and was carried on at a considerable profit. The objection to this charge was not pressed on the appeal. Mr. Snelling was an auctioneer, and was always employed by the defendant company on all sales of the property and was paid the usual commission. Mr. Reeves was a chartered accountant, and, in addition to his salary as secretary of the company, was paid 80*l.* per annum for keeping the books of account of the estates, which were very complicated. It was not alleged that these payments were in themselves unfair or unreasonable, but it was objected that they could not be charged against the plaintiff.

The articles of association of the old company expressly provided that any director might make a profit out of any contract he made with the company, provided he did not vote in respect of any contract or arrangement in which he was interested, and the articles of the defendant company contained provisions to the same effect.

Neville J. held that, in taking the accounts between the plaintiff and the company under the agreement of April 20, 1893,

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all the above salaries, commissions, and profit costs must be disallowed. The order directing the account contained the following declaration: "that the old company were not and the defendant company are not entitled to make any charge against the plaintiff (1.) for or in respect of the keeping of the accounts proper to be kept under or in relation to the said agreement, or (2.) for or in respect of any profit or remuneration to their respective directors or any of them, or any firm of which such directors or any of them were members at the time of the doing thereof in relation to the said agreement."

The company appealed against this declaration.

Jenkins, K.C., *Younger*, K.C., and *H. C. Bischoff*, for the appellant. The second part of the declaration is also wrong. The company may be in a fiduciary position towards the plaintiff, but there is no fiduciary relationship between the directors and the plaintiff. The directors are in a fiduciary position to their company, but not to the stranger with whom the company is dealing. The directors here were nothing but the agents of the company and owed no duty whatever to the plaintiff. Admitting that the company was in the position of a mortgagee in possession, that does not affect the position of the directors so far as the plaintiff is concerned. The company as a trustee is entitled in proper cases to employ and pay solicitors, auctioneers, accountants, and agents, and if outsiders had been employed by the company it is admitted that these payments would have been allowed. As far as the plaintiff is concerned these directors are outsiders and stand in no fiduciary relationship towards him.

The rule laid down in *Aberdeen Ry. Co.* v. *Blaikie Brothers* (1) does not apply to the present case; the company makes no profit out of these payments, and is not within the rule. *Nicholson* v. *Tutin* (2) is distinguishable. The company here were bound to employ a solicitor, and he can, as against the company, retain his profit costs, even though he be solicitor to a mortgagee in possession: *In re Doody.* (3)

(1) (1854) 1 Macq. 461. (2) (1857) 3 K. & J. 159.
(3) [1893] 1 Ch. 129.

Kavanagh v. *Workingman's Benefit Building Society* (1), which was relied on in the Court below, though it contains dicta in favour of the plaintiff's contention, is wrong; it is fallacious to say that any director stands in a fiduciary relation to the mortgagor. The directors here are not under any liability to account to the company for any remuneration they may have received for their professional services: *In re Dover Coalfield Extension, Ld.* (2)

Assuming that May had been a mortgagee, his firm's profit costs would have been allowed under the Mortgagees Legal Costs Act, 1895; here he was only acting as agent for the mortgagee, a much stronger position.

Under the articles, the directors are entitled to make profits out of their contracts with the company. All these directors were properly appointed by the company as their solicitor, auctioneer, and agent respectively.

Felix Cassel, K.C., Whinney, and *J. M. Stone,* for the respondent. The company has managed this property under an agreement which provides and defines its remuneration, and the plaintiff was entitled to the services of the officials of the company in carrying out this agreement. In accounting the company cannot be allowed, as against the plaintiff, any disbursements to its directors by way of salary or commission for managing the property, and the profit costs of the solicitor-director should also be disallowed. The directors are the brains of the company; the company can only act by and through its directors. All these payments, therefore, are within the absolute rule of equity that a person in a fiduciary relationship to another is not allowed to put himself in a position in which his interests conflict with the interests of those he is bound to protect. *Kavanagh* v. *Workingman's Benefit Building Society* (1) is directly in point.

The directors as sub-agents for the company were, equally with the company, in a fiduciary position to the plaintiff and could make no profit out of these transactions: *Powell & Thomas* v. *Evan Jones & Co.* (3) The argument for the appellant, if pushed to its logical conclusion, would authorize the directors, or

(1) [1896] 1 I. R. 56. (2) [1908] 1 Ch 65.
(3) [1905] 1 K. B. 11.

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any one of them, to buy this property from the company of which they are the directors, but the disability which prevents the trustee for sale from purchasing the property applies equally to his agent for sale: *In re Bloye's Trust.* (1)

[COZENS-HARDY M.R. referred to *Lewis* v. *Hillman.* (2)]

In *Hodson* v. *Deans* (3) a sale by a friendly society of mortgaged property to one of its officers was set aside. In *Martinson* v. *Clowes* (4) the sale to the secretary of the mortgagees was set aside. The agent cannot do what the principal is not allowed to do, and there is no distinction in principle between employing a director at a salary to manage the estate and selling it to him, as in each case duty and interest are in conflict.

[BUCKLEY L.J. referred to *Farrar* v. *Farrars, Ld.* (5)]

The directors might have employed an independent solicitor, but if one of these, being a solicitor, does the work, his profit costs cannot be retained. A solicitor trustee is only entitled to be repaid costs out of pocket: *Broughton* v. *Broughton.* (6) As to profit costs, in *Bray* v. *Ford* (7) it was held to be a misdirection to tell the jury that a solicitor who was also the governor of an institution was entitled to profit costs.

A mortgagee with a power of sale who was a member of a firm of auctioneers was disallowed his commission in *Matthison* v. *Clarke.* (8)

These payments are either extra remuneration to the directors for doing this work and so cannot be charged against the plaintiff, or they are improper payments which the company can recover from its officials and so are not out of pocket expenses.

Jenkins, K.C., in reply.

Cur. adv. vult.

April 10. COZENS-HARDY M.R. Two questions have arisen in the taking of these accounts, the first of which turns upon the construction of a somewhat peculiar agreement, and the second of which involves questions of general importance.

(1) (1849) 1 Mac. & G. 488.
(2) (1852) 3 H. L. C. 607.
(3) [1903] 2 Ch. 647.
(4) (1882) 21 Ch. D. 857.
(5) (1888) 40 Ch. D. 395.
(6) (1855) 5 D. M. & G. 160.
(7) [1896] A. C. 44.
(8) (1854) 3 Drew. 3.

[Having stated the material portions of the agreement and the facts as above, his Lordship continued:—]

The first question is whether any charge can be made by the company for or in respect of the keeping of the accounts required by the agreement to be kept by the company. The company, for valuable consideration, undertook to manage, develop, realize, and dispose of this property, and they cannot charge all or any part of the salary paid to their secretary for keeping the accounts. They might as well charge office rent or directors' fees. The words at the end of clause 1 do not entitle the company to hand over the whole management to somebody else for reward. They refer to things which may or may not, at the discretion of the company, be done. The language of clause 7 also seems to me to negative the company's contention.

The second question arises in the following circumstances. [Having referred shortly to the employment of the various directors in their professional capacity, his Lordship continued:—]

Neville J. has declared that the company are not entitled to make any charge for or in respect of any profit or remuneration to the directors or to any of them, or to any firm of which any such director was a member for anything done by such directors or any of them, or by any firm of which such directors or any of them were members at the time of the doing thereof in relation to the agreement. Now it has not been disputed that the company stood in a fiduciary relation to the plaintiff, and in my view it is not very important to ascertain precisely the nature of that relation. During all the period in question the company were mortgagees in possession. They may also be regarded as managers of a joint adventure. However that may be, it is clear that not one penny of profit can be claimed by the company beyond that which is expressly provided for in the agreement. But I fail to see on what ground the company can be charged with profits which in fact the company did not receive and which were received by the directors.

Directors stand in a fiduciary relation to the company, but not to a stranger with whom the company is dealing. It is of course true that a company acts through its directors. But that does

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not involve the proposition that if a breach of trust is committed by a company, acting through its board, a beneficiary can maintain any action against the directors in respect of such breach of trust. Of course I except the case where trust property can be followed into the hands of a director, or of any stranger with notice. No such point arises here.

It is argued that it was an implied term of the agreement that all the services of the directors should, as between the plaintiff and the company, be rendered gratuitously. Another way in which the same result was sought to be reached was by suggesting that, although solicitors and auctioneers might be employed by the company and paid for their services, it was an implied term that no director should be so employed. I can find no foundation for such argument. Moreover, a breach of such implied term (if any) would give rise to a claim for damages only, which would not be measured by the amount of profits earned by the director or his firm. On principle I think it is clear that, in an action of this nature to which the directors are not made parties, it cannot be right to treat their profits as sums improperly received by the company, or improperly paid away by the company.

But it is said that there are two authorities which justify the declaration appealed against. *Nicholson* v. *Tutin* (1), before Wood V.-C., creates no difficulty, and indeed it seems to me to be a plain case. Tutin and Watson were trustees of a creditor's deed, the trusts of which were being administered under the decree of the Court. In the accounts carried into chambers by the trustees, a sum of 450*l.* was charged by Watson as commission for collecting the rents. Watson alleged that, after the execution of the creditor's deed, he was appointed agent of mortgagees, who had no express power to appoint a receiver, to receive the rents. But this was held no justification for a charge of the 450*l.* against the plaintiff Nicholson, between whom and Watson there was a direct fiduciary relation. It has no bearing upon the present case. The case of *Kavanagh* v. *Workingman's Benefit Building Society* (2) is no doubt directly in point. The defendants were mortgagees in possession, the

(1) 3 K. & J. 159.

(2) [1896] 1 I. R. 56.

mortgage deed containing a power to appoint a receiver. The defendants appointed one of their directors receiver to collect the rents. The appointment was by deed under the seal of the corporation, in pursuance doubtless of a resolution of the board of directors. Under a redemption decree, the defendants charged commission at 5 per cent. for collecting the rents. The Court of Appeal in Ireland held that the company could not claim any commission paid to the director. Lord Ashbourne thought the director could not claim commission against the mortgagor, because he might have voted for his own appointment. FitzGibbon L.J. thought the disability arose from inconsistency between duty and interest. He is reported to have used these words (1): "Public policy and equitable doctrine are both against allowing the claim, which could only be made for the pecuniary benefit of one director through the action of the board of directors, against the interest either of the company or of the mortgagor, to both of whom every director stands in a fiduciary relation." Barry L.J. said it made no difference that the director was not the mortgagee himself, but a "part of the corporation." And Walker L.J. substantially agreed with FitzGibbon L.J. With all respect to the very learned judges who decided that case, I am unable to follow their reasoning. It seems to me fallacious to say that every director stands in a fiduciary relation to the mortgagor. The conflict between interest and duty only arises where a fiduciary relation exists between the parties. Reference was also made to *Powell & Thomas* v. *Evan Jones & Co.* (2), but I am unable to discover that it in any way assists the plaintiff in his contention. I base my decision upon the broad principle that directors stand in a fiduciary position only to the company, not to creditors of the company, not even to individual shareholders of the company, still less to strangers dealing with the company. This principle applies equally whether the relation between the company and the stranger is one purely of contract, such as principal and agent, or is one of trustee and cestui que trust. To speak of directors as the "brains" of the company or the "hands" of the company is only to use words which have no definite meaning in this connection.

(1) [1896] 1 I. R. 58.

(2) [1905] 1 K. B. 11.

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Cozens-Hardy M.R.

With great respect to Neville J., who followed the Irish decision, I am unable to concur in his view. I think the declaration as to profits received by directors should be struck out. But in order to avoid mistakes it is desirable to add words to the following effect: "But the omission of this declaration is without prejudice to any question as to the propriety of employing any such director or his firm, or any other person in any particular transaction, or as to the amount of remuneration paid in respect thereof."

As the appellants have partly failed and partly succeeded, I think there should be no costs of the appeal.

FLETCHER MOULTON L.J. In this appeal the defendants ask that the declaration which accompanies the order for an account made by the Court below in this action should be amended in two respects. In the first place it declares that the defendants are not entitled to make any charge against the plaintiff for or in respect of the keeping of the accounts required by the agreement of April 20, 1893, to be kept under or in relation to the said agreement, and, secondly, for and in respect of any profit or remuneration to any of the directors of the defendant company, or to any firm of which any such director was a member, for anything done by such director or firm in relation to the said agreement. The question for this Court is whether these declarations ought to stand.

The first declaration does not, in my opinion, offer any serious difficulty. The accounts in question are required to be kept by clause 7 and clause 9 of the agreement. The agreement no doubt was of a complex character. It contemplated the defendant company paying off the charges on the plaintiff's property and getting it vested in themselves. When this had been done the defendants were to manage, develop, realize, or dispose of the property in such manner as they in their discretion should think best subject to the provisions of the deed. They were to be entitled to advance moneys for the improvement of the property and incur costs, charges, and expenses. On all their advances they were to be entitled to 6 per cent. One third of the profit income was to go to the plaintiff and the other two

thirds were to go to the defendants towards the discharge of their claim on the estate. At the end of the adventure the balance remaining after payment of all the advances, &c., was to be divided in the proportion of two thirds to the plaintiff and one third to the defendant company.

The peculiar nature of the contract would afford substantial ground for considering that the defendant company were in a fiduciary relation to the plaintiff in connection with the property, or that at all events they must be looked upon as agents and as such disentitled to make any profit out of the management other than that given to them by the agreement. But in addition to this the defendant company, after paying off the mortgages and entering into possession of the property, were clearly in the position of mortgagees in possession so far as the plaintiff was concerned. It was necessary for them to keep accounts of the expenditure and income of the estate in both these characters. But the agreement does not leave it to be inferred that such accounts ought to be kept. By clause 7 it provides that they shall keep proper accounts in books shewing the receipts and expenditure of all moneys receivable or payable under the agreement or in connection therewith or with the property dealt with thereunder, and by clause 9 it further provides that two separate accounts shall be kept by the defendant company, one in respect of income and one in respect of capital. Now as these are specific obligations placed upon them by the agreement and no provision is made for remuneration for performing these duties, the ordinary and proper construction would be that their doing this at their own cost was part of the consideration moving from them, the remuneration for which was included in and formed part of the general consideration for the deed, i.e., the share in the ultimate surplus. But the defendants say that there is a specific provision in clause 1 to the contrary effect. To my mind it is for the defendants to shew the existence of such a provision. Otherwise, as I have said, they would not be entitled to remuneration for these specific obligations of the agreement.

The defendants seek to make out their contention in the following way. Clause 1 authorizes the defendant company to manage, develop, realize, or dispose of the property. Pausing

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there, I am of opinion that as they were a company formed for the purpose of realizing estates, the covenant meant that they were to do the management, &c., themselves and at their own expense as consideration moving from themselves, for which they would be remunerated by the consideration moving from the plaintiff. The clause goes on to authorize them to advance money for clearing incumbrances off the estate and to sell, lease, or let any parts of it, and then come these words, on which the whole of the argument of the appellants is based: "and in the management development realization or disposal of the said property may advance any moneys for the improvement thereof and incur any costs charges or expenses necessary or proper for the purposes thereof."

The defendants contend that these last words entitle them to throw all the cost of management on the plaintiff. When pressed with the question what then did the defendant company undertake to do themselves no answer was forthcoming. In my opinion the words bear a clear and reasonable meaning, namely, that the work of management, &c., is to be done by the defendant company and its servants as part of the consideration of the deed, but that if they have to incur costs, that is to say, spend money on the property, they are entitled to take credit for it. To put it into a single phrase, they must bear the expenses of management because they have undertaken to do it, but they have not got to bear themselves the expenses incurred in management. Those are naturally to be debited against the property. The position in which the words come strengthens this view, for they are immediately preceded by the words "may advance any moneys for the improvement thereof." But even if those words were absent I should look upon the construction which I have given as the natural meaning of the words as used. The defendants were in my opinion bound to have a staff adequate to enable them to perform the duties of management, &c., which they had taken upon themselves, and they were not entitled to charge the cost of maintaining such a staff against the property. Whatever further expenditure was required was of the nature of expenditure on the property, and that cannot be charged against them, for they had not

undertaken to develop the property at their own expense. Keeping proper accounts is a necessary part of management, and even under clause 1 I should have held that they were bound to keep such accounts as an agent ought to keep, and to keep them at their own expense. But certainly I cannot attribute to these words in clause 1 a meaning which would have the effect not only of excusing them from keeping such accounts as being incidental to the management which they had undertaken to do, but also of entitling them to charge for the accounts which they have specifically undertaken to keep under clauses 7 and 9 of the agreement.

The second declaration raises a point of great general importance. It declares that the defendant company are not entitled to make any charges against the plaintiff for or in respect of any profit or remuneration to their respective directors or any of them, or to any firm of which any such director was a member for anything done by such directors or any of them, or by any firm of which they were members at the time of the doing thereof in relation to the said agreement as modified. We have not now to decide whether any particular item of charge is or is not within this declaration, so that there is no necessity to go into the special facts of the case; but in order to make the declaration comprehensible it is necessary to state that on the evidence it would appear that the directors appointed one of their number manager of a portion of the estate at a salary fixed by them, employed another as auctioneer, and a third (or rather the firm of which the third was a member) as solicitor in all matters relating to the estate at full professional charges, including, of course, profit costs. It would also appear that at least on one occasion one of the directors took a commission for effecting a sale of a portion of the property. From the line which the argument on behalf of the appellants took, it is unnecessary to inquire whether there were other instances of remuneration going to the directors individually, and hence these must be taken only as specimens of what the appellants claim to be entitled to do as of right.

There is no lack of boldness in the propositions contended for by the appellants. They contend that the directors of a company

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which is acting in a fiduciary relation to an individual—in short, in the position of a trustee towards him—are merely in the position of agents of a trustee, and that it is a settled principle of English law that an agent of a trustee is not in any fiduciary relation to the cestuis que trust. Accordingly they say that the directors of the defendant company had no duty whatever to the plaintiff. They admit that the company of which they were directors was in the position of a mortgagee in possession, and I do not think that they dispute that its position under the agreement of April 20, 1893, also was one of such a fiduciary character that it was liable to account to the plaintiff and could make no personal profit out of its actual administration of the estate. But they maintain that these facts entail no consequences so far as the directors of the company are concerned, that their position was simply that of agents for the company, and that, provided the company itself did not object, they might sell the trust property to members of their body, allow to one another commissions in respect of sales, &c., of the trust property, and employ one another for reward on such terms as they should think proper in respect of the development and realization of that property. They contend that the fiduciary relations existed between the company and the plaintiff only, and that the directors were entirely unaffected by the existence of those relations, by the fact that they were administering the property for the company as a trustee, and by their complete knowledge both of the position of the company and the relations in which it stood to the plaintiff.

It would be difficult to exaggerate the importance of the questions thus raised, especially at a time when there is an increasing tendency to employ corporate bodies in the execution of trusts. The strength of the position of cestuis que trust hitherto has been that no profit could be made by those administering the trust out of such administration, so that no question of self-interest could divert the trustee from the duty to use his powers solely in the interests of the cestuis que trust. But if such principles are wholly inapplicable to the individuals who, in the case of a trustee company, are the persons really administering the trust, i.e., the directors, and if they can use the powers

which are thus in their hands to their own personal advantage without incurring any liability to the cestuis que trust, the whole security of the position is gone. Yet this is what is contended for by the appellants. Suppose that in such a case there is a sale to the directors or some of them. The appellants argue that inasmuch as the company does not pocket the profits made by the directors there is no breach of trust. So far as the directors themselves are concerned it is contended that they have no duty whatever to the cestuis que trust, who cannot therefore impeach the sale even though the purchasers have a hand in fixing the price. They contend that the directors are liable to the company and to it alone, and hence that if the company does not complain (and the directors will decide whether it shall do so or not) the cestuis que trust are helpless except so far as they can make out a case of negligence leading to damage—a very poor substitute for the protection afforded by the principle of equity that no one may allow himself to be in a position in which his interest conflicts with his duty.

It is needless to say that if propositions of so wide a character as those contended for by the appellant can be established the declaration appealed against is wholly wrong. But in my opinion they cannot be established. There is, in my opinion, a fundamental fallacy in the whole of the argument addressed to us by counsel for the appellant on this part of the case. It is that they have confounded the proposition that a man does not come into fiduciary relations with the cestuis que trust merely by becoming an agent of the trustee (a proposition of undoubted validity) with the proposition that an agent to the trustee cannot stand in a fiduciary relation to the cestuis que trust. This is to my mind as grave an error as for a criminal lawyer to maintain the proposition that a fact that is not sufficient to secure a conviction is sufficient to necessitate an acquittal. In order to establish a fiduciary relation between the cestuis que trust and an agent of the trustee you must look at the facts of the case and see whether they establish such a relationship. It is impossible to say generally whether an agent of a trustee is in a fiduciary relation to the cestuis que trust, but it is not only possible, but correct, to say that if nothing is present but the fact

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that he is an agent of the trustee, that alone does not suffice to make him responsible to the cestuis que trust. In such matters a man's responsibilities depend on the acts which he does and the knowledge that he possesses at the time when he does them. This is true whether a man be an agent of a trustee or not. His being such agent does not shelter him from the responsibilities flowing from the knowledge he actually possesses, whether that knowledge has come to him by virtue of his position or aliunde. If it is such that it would suffice to make a third person liable to the cestuis que trust for the acts done by him, his being an agent to a trustee is no defence against his being held to be so liable.

To illustrate this it will only be necessary to refer to the language of Lord Cottenham in *In re Bloye's Trust.* (1) He treats the case before him as a case of a person selling under a power of sale whereby he becomes trustee for the surplus and bound to account for it. He employs an attorney or agent to conduct the sale. Lord Cottenham, quoting with approval the language of Lord Eldon to the like effect, lays down clearly that the disability which prevents the trustee for sale from purchasing the property applies equally to his agent for sale. After pointing out that the trustee for sale is not allowed to purchase because "the Court will not permit a party to place himself in a situation in which his interest conflicts with his duty," he goes on to say: "This, then, is the rule. Now practically, the agent is the party who is to conduct the sale, for in ninety-nine cases out of a hundred, the principal takes no part in it; he directs the sale of the property, but the solicitor, the auctioneer, or the agent, is the party who is to conduct it, and on whose exertions the result of the sale depends; and, therefore, to say that the principal is incapacitated but that the agent is not, would be an absurd distinction, the reason remaining the same, and being as applicable to one as to the other." In such a case the agent for sale is an agent for the trustee, but he is an agent who has full knowledge that the sale is by a trustee who has the duty to account to his cestuis que trust, and the law as laid down here by Lord Cottenham is only sustainable because his accepting

(1) 1 Mac. & G. 488, 495, 496.

with that knowledge the position of agent for carrying out the sale, (though contractually his employment is solely by the trustee,) affects him with a duty to the cestuis que trust. Many other cases could be given in which persons who have no direct connection with the cestuis que trust, but who are in contractual relation with the trustee alone, are by reason of their knowledge of the position of the trustee, their employer, saddled with responsibilities towards the cestuis que trust. Many of the cases relating to bankers come under this category, such as *Pannell* v. *Hurley* (1), *Foxton* v. *Manchester and Liverpool District Banking Co.* (2), and *Bodenham* v. *Hoskyns.* (3) None of these cases cast any doubt upon the proposition that a person does not become liable to the cestuis que trust merely by being an agent of the trustee, even though he should be the actual agent in carrying out the breach of trust by the trustee. But they shew that it is no defence against the liability which the circumstances of the case would, according to the doctrines of equity, otherwise entail to say that you were acting under a contract with the trustee whether of agency or otherwise.

The principles of equity in such a connection are laid down with perfect clearness in the opinions of Lord Cairns and Lord Westbury in *Gray* v. *Johnston.* (4) After a judgment which insists on the importance of not interfering with the liberty and duty of bankers to obey the directions of their customers, even though the latter propose to commit a breach of trust, Lord Cairns lays down the conditions under which a banker will be held liable to the cestuis que trust as being that there must be some misapplication in breach of trust intended by the trustee and that there must be proof that the bankers were privy to the intent to make this misapplication. He adds (5), "If it be shewn that any personal benefit to the bankers themselves is designed or stipulated for, that circumstance, above all others, will most readily establish the fact that the bankers are in privity with the breach of trust which is about to be committed." These

(1) (1845) 2 Coll. 241.
(2) (1881) 44 L. T. 406.
(3) (1852) 2 D. M. & G. 903.
(4) (1868) L. R. 3 H. L. 1.
(5) L. R. 3 H. L. 11.

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cases with regard to bankers do not turn on the special relationship of banker and customer. Indeed, that is a relationship which the Court would above all others seek to keep free because it is the least intimate. It would, in my opinion, be far more ready to interfere in the case of a solicitor or other agent employed pro hac vice with full knowledge of the circumstances, and aware that he was employed as the hand by which the breach of trust was to be carried out. I do not, however, propose to go generally into the nature and degree of the privity which would suffice to move the Court to act. Fiduciary relations may exist in innumerable forms and are of innumerable kinds. They may arise from specific contract, but they may and often do arise out of acts or relationships creating a duty, and as we have here in this case a very definite type of relationship I propose to confine my consideration to it.

The simple question is whether, where a limited company undertakes the administration of a trust, the directors as individuals may come under a duty to the cestuis que trust, and if so under what circumstances and to what extent? In the first place, I am of opinion that although the directors of a company are properly described as its agents and act as such, there is a broad distinction of degree between them and ordinary agents which is of importance in deciding such a question as this. It is that so far as knowledge and intention are concerned the company is an abstraction. Where directors actually perform their part in the management of the company they are both the brains and hands of the company, and they cannot shelter themselves under the plea that the knowledge of the trustee is not their knowledge, or that the nature and intention of the acts of the trustee were unknown to them. Contrast their position with that of an agent for sale, such as a broker employed by a company or a person to effect a sale of trust property. He can know nothing more than he is told, and the Courts have rightly held that it would be intolerable if he were held bound to refuse to act in the ordinary course of his profession or business by reason of mere suspicions as to the intentions of the persons employing him. But nothing of this kind can apply to the case of directors such as we have here. They

have complete and perfect knowledge of the nature of the acts which the company is doing through them. But they have even more than this. They know that there is no mind interposed between them and the cestui que trust which administers the trust. It is they who are in fact doing it and no one else, although it may be done in the name of the company.

Now I do not think it would be in accordance with the principles of equity to hold that these considerations make them liable for all breaches of trust on the part of the company, even though such breaches of trust were planned and carried out by themselves. The contractual liability of carrying out the trust is undertaken by the company, and it may involve responsibilities of a serious kind depending on a right construction of their powers and duties. Honest error in such matters might well render the company liable in the same way as it would be liable for negligence, but the directors would not be liable in respect of such matters. But in my opinion they are liable for matters of personal conduct inconsistent with their full knowledge of the fiduciary character of the duties which, in the name of the company, they have to carry out. And first and foremost among such matters of personal conduct stands the making of personal profit. That is a matter the responsibility for which no man can place on the shoulders of another. It is an act for which he alone is responsible. No man can be compelled to make a gain or to allow himself to be put in a position which, in the view of equity, forbids him to say that he has not made a gain. In the present case we have to deal with acts such as these on the part of directors, and it is to such cases that I desire to confine my decision. In my opinion, whether or not the company (with whom they no doubt stand in the contractual relation of agent) is willing to permit it, the directors may not use their position as de facto administrators of a trust to profit themselves or one another. So far as such matters are concerned the principles of equity will not allow them to do for themselves that which their formal principal could not if he were an individual do for himself.

In the present case there is a provision in the articles that a director may not himself vote on a matter concerning himself

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personally. But it was contended by the appellant, and I think rightly, that this is a matter which the company might waive, so that in considering the general principle we need take no notice of the existence of such an article. To test, then, the proposition contended for by the appellant one may take the case of a single managing director of a company managing a trust. He purchases part of the trust property for himself. Can such a sale stand? He knows that it is the duty of his company to get the best price in the interest of the cestuis que trust and that he is acting for his company in carrying out that duty. Can it be seriously contended that in buying it he is not allowing himself to be in a position where his interest conflicts with his duty? It is true that it may be immaterial to his company what price is obtained for the property, inasmuch as they will have to account for it whatever it be. That which therefore shocks the conscience in such a transaction is not the faithlessness to the company which is shewn in the act, but the breach of some duty to the individual who has entrusted the company with the powers he is exercising in its name. And if this be a right view of the transaction it carries with it the necessary conclusion that his position and his knowledge place him in a fiduciary relation to the cestuis que trust of the company.

So far I have dealt with the question only from the point of view of principle. But there is, in my opinion, a substantial amount of direct authority on the point. In the case of *Kavanagh* v. *Workingman's Building Benefit Society* (1) the Court of Appeal in Ireland refused to allow a director of a mortgagee company to make profit for himself in the shape of remuneration for receiving the rents of the property after the company had gone into possession. In *Hodson* v. *Deans* (2) the plaintiff mortgaged certain property to the trustees of a friendly society to secure an advance. The company, in proper exercise of its power of sale, put up the property for sale by auction, using as agents for that purpose a committee of the society. One of the members of that committee attended the auction and bought the property for himself. Joyce J., relying on

(1) [1896] 1 I. R. 56. (2) [1903] 2 Ch. 647, 653.

the language of Lord Cottenham in *In re Bloye's Trust* (1), set aside the sale, holding that "the investment committee could not have sold privately to themselves either as representing the society or as individuals at a price fixed by themselves, nor could they, I think, have so sold to one or more of their number." In *Martinson* v. *Clowes* (2) a building society as mortgagees sold some property by auction, and the secretary of the society, who had instructed the auctioneer and communicated to him the reserve bids, purchased the property for himself. The Court set aside the sale. Finally, in *Powell & Thomas* v. *Evan Jones & Co.* (3) agents who were employed for commission to procure an advance of money for their principals employed a sub-agent. He obtained the advance, receiving a secret commission therefor. The sub-agent was aware that the agents were acting in the matter for their principals. It was held that the sub-agent stood in a fiduciary relation to the principals, and was therefore accountable directly to them for the commission he had received.

In the whole of these cases the Court must have found that the knowledge of the agent that the matter in which he was acting was one in which his principal was a trustee, sufficed under the circumstances of each case to place him in a fiduciary relation with the cestui que trust of his principal, because they affirm the right of the cestui que trust to interfere in the transaction. In none of the above cases was the knowledge of the agent so complete as in the present case. The directors here knew everything and were the only persons in that position. To my mind they could not make any profit for themselves either as a body or as individuals out of the management of this estate, of which the company of which they were directors was mortgagee in possession and otherwise stood in the position of trustee towards the plaintiff. And if this be so it follows that they could not take remuneration for acts done by them in the administration of the trust, for to do so might, if not must, bring profit to them personally. I can draw no distinction between what they did and actually making a profit out of the trust as by a purchase of a portion of

(1) 1 Mac. & G. 488. (2) 21 Ch. D. 857.
(3) [1905] 1 K. B. 11.

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the trust estate. Fixing one's own remuneration and fixing the purchase price of property bought by one's self are in trust matters acts of the same nature. If there is no fiduciary relation between the directors and the cestuis que trust both these acts are justifiable, but if there is such a relation neither is so. If I am right in the conclusion that the possession of knowledge of these directors placed them in such a fiduciary relation to the plaintiff that they could not be allowed to make a profit for themselves, the acts which they did were certainly of a character which no person in such a fiduciary relation would be allowed, according to the principles of the Court of Equity, to do. To take commissions for sales, to take payment for management of the property and to perform solicitor's business for remuneration, i.e., for profit costs, could not be allowed to them if they were to be affected by the knowledge that they were the actual administrators in their own discretion of a trust estate. With regard to this I cannot do better than quote the language of Lord Herschell in *Bray* v. *Ford* (1): "It is an inflexible rule of a Court of Equity that a person in a fiduciary position, such as the respondent's, is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict. It does not appear to me that this rule is, as has been said, founded upon principles of morality. I regard it rather as based on the consideration that, human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect. It has, therefore, been deemed expedient to lay down this positive rule."

There is only one more point to notice. Can the plaintiff avail himself of these rights in an action between himself and the company in which the company has to render an account of the execution of the trust? In my opinion there is no difficulty in his so doing so far as is involved in the declaration of the learned judge. All the matters to which it refers are cases of payment out by the company to its directors in respect of matters for which

(1) [1896] A. C. 51.

they were not entitled to receive any payment, and therefore such payments out cannot be justified by the defendant company and must be disallowed. No doubt there might have been acts within the forbidden category which could not have been dealt with in such an action as the present, but no such acts are challenged in the present action or affected by the declaration.

I am therefore of opinion that the second declaration of the learned judge was in substance correct, and that this appeal should be dismissed with costs.

BUCKLEY L.J. The first declaration under appeal is, I think, in substance right, but I prefer to vary its language so as to convey more exactly that which I understand to be intended. The declaration, I think, should run "for or in respect of the keeping of the accounts by the agreement of April 20, 1893, required to be kept by the company." The point upon this declaration arises upon the concluding words of clause 1 of the agreement. In my judgment the words "incur any costs charges and expenses necessary or proper for the purposes aforesaid" are not words which entitle the company to charge in respect of acts which under the agreement the company as between themselves and Mr. Bath are bound to do for the consideration secured to them by the agreement. The costs, charges, and expenses are in respect of acts which the company may do, not acts which contractually they must do. One of the acts they are bound to do is to keep accounts, for by clauses 7 and 9 it is expressly provided that the company shall keep accounts. There are other acts, I think, not specifically provided for by the agreement which, upon the true construction of the agreement, the company are bound to do. For instance, the company cannot charge for their skill or their time in managing the properties or in doing the other acts which under clause 1 they are bound to do. It is not possible to define with exactness what are the acts which fall within this category, but in any concrete case it may not be difficult to say whether the matter is one in which the company can charge. This statement is probably sufficient without the introduction of express words into the order. The words which the Master of the Rolls

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has proposed to add to the second declaration go to the same point.

The second declaration under appeal is one which declares that the company cannot make any charge against the plaintiff for or in respect of any profit or remuneration to a director of the company or any firm of which a director was a member for anything done by such director or firm in relation to the agreement. The judgment under appeal affirms that the directors, acting as they do as the natural persons who act for the corporation, stand towards the plaintiff in such a relation as that they cannot make (any more than the company could have made) a profit to themselves outside the remuneration provided by the agreement, and that the company ought, as between the company and Mr. Bath, to be disallowed any profit or remuneration paid to them. This conclusion is rested upon the proposition that the directors stand in a fiduciary position towards Mr. Bath. In my opinion this is erroneous. A fiduciary relation can only arise either contractually or by implication of law. The contract between Mr. Bath and the corporation is one to which the directors are not parties. No one could contend that a director is in any way liable upon or in respect of the contract of the corporation. Between Mr. Bath and the directors there exists no privity of contract. Then does there arise as between those parties any fiduciary relation by implication of law? I think not. Under circumstances, such a relation might arise by implication of law. The facts here do not raise it. Upon this question of fiduciary relation Mr. Cassel principally pressed upon our consideration the decision in *Powell & Thomas* v. *Evan Jones & Co.* (1) The point in that case was as follows: A. employed B. to procure an advance for a certain commission. B., with the assent of A., employed C., a sub-agent, on the footing that B. and C. should share the commission which A. was paying. C. knew that B. was agent for A. C. procured the advance, but without the knowledge of either A. or B. received from the Law Guarantee Society, who were making the advance, a commission for introducing the business to them. One alternative dealt with in the judgment is that of its being established that there was no privity of contract

(1) [1905] 1 K. B. 11, 18.

between A. and C. In this alternative, however, it remained that C. knew that B. in employing him was acting for A., and that if C. stipulated that the Law Guarantee Society should give him a commission they would naturally take that into account in making their terms with A., and the more commission C. got the harder would be the terms for A. C. was a person who was to share the commission which A. was paying, and at the same time was asserting a right to make a bargain with the Law Guarantee Society to the injury of A., who was paying him in the transaction. Under these circumstances Collins M.R. said that "inasmuch as he (C.) knew that the advance for which he was negotiating at the instance of Powell & Thomas (B.) was an advance which they had been employed by Evan Jones & Co. (A.) to procure for a commission which he (C.) was to share, he stood in a fiduciary relation to the latter, which debarred him from making a private profit for himself out of the transaction without their knowledge or consent." This was a case in which even if there were no privity of contract between A. and C. yet C., with the knowledge which he had, owed A. the duty of not exacting from the Law Guarantee Society a commission which in substance A. would have to bear when C. was already sharing the commission which A. was paying for the transaction. There was no express contract, but the facts were such that as between A. and C. there was to be implied a term that C. should not receive payment from A. and take also a second payment from the Law Guarantee Society to the detriment of A. The case is an illustration of the proposition that the confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it. (See the note to *Coggs* v. *Bernard*, Smith's Leading Cases, 11th ed. vol. i. p. 188.)

The illustrations of the principle that a trustee cannot profit in the matter of the trust are of course numerous. Some of them have been referred to. A mortgagee with power of sale cannot employ as auctioneers the firm of which he is a member and take a commission: *Matthison* v. *Clarke*. (1) A trustee who is a solicitor cannot take profit costs for transacting the legal

(1) 3 Drew. 3.

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business of the trust: *Broughton* v. *Broughton*. (1) There are many cases in which the agent of the trustee is debarred as much as the trustee himself from doing that which the trustee could not do. The solicitor of the trustee who is conducting the sale of the trust property cannot buy: *In re Bloye's Trust* (2); *Lewis* v. *Hillman*. (3) As Lord Cottenham said (4), "To say that the principal is incapacitated but that the agent is not would be an absurd distinction the reason remaining the same and being as applicable to the one as to the other." This was also the principle of *Hodson* v. *Deans*. (5) But there is an obvious distinction between cases of that class and the case with which we have here to do. A trustee may of course employ and pay an agent for a purpose proper in the execution of the trust. A trustee who employs a solicitor or a collector of rents or an auctioneer properly for the purposes of the trust is of course entitled to be reimbursed his expenses of so doing. The trustee, however, must not render such a service himself and take payment for it himself, because he then puts himself in a position in which his duty and his interest conflict. Whatever profit the trustee makes he must account for to his cestui que trust. But the case here is that the trustee is a corporation, and when (to take Mr. May's case) the corporation employed Mr. May as solicitor it was employing him to do for the trust an act which the corporation could not do, for the corporation is not a solicitor, and the profit costs which Mr. May might receive were not and could not be received by the trustee. The principle, therefore, that the trustee is receiving profit obviously does not apply. But it is said that the trustee company must be disallowed the profit costs which Mr. May received, because the corporation ought not to have employed him inasmuch as he was one of its directors. I know of no principle upon which this proposition can be supported. The board of directors of whom Mr. May was one made the appointment; but the duty to make a proper appointment as towards Mr. Bath was not in Mr. May, but in the company. A director is not personally liable for the

(1) 5 D. M. & G. 160.
(2) 1 Mac. & G. 488.
(3) 3 H. L. C. 607.
(4) 1 Mac. & G. 496.
(5) [1903] 2 Ch. 647.

breach of trust or breach of duty of the company towards a person contracting with the company. Mr. May therefore, in making the appointment (if he did make it), was not acting in a matter in which he personally owed a duty to Mr. Bath. He owed a duty to the corporation whose director he was, but he owed no duty to Mr. Bath. He was acting for the corporation in exercising the powers which Mr. Bath had contractually created in the corporation. If the corporation wrongfully employed him or paid him excessive sums, the corporation of course are liable to Mr. Bath for any breach of duty as between those two parties. But if it properly employed a solicitor and paid him proper sums, why should the solicitor be deprived of the payment for services which the corporation could not render and which have been properly rendered, or why should the corporation be disallowed the amount so paid? The declaration under appeal affirms that the corporation cannot charge Mr. Bath with the expenses of employing a solicitor (who for the present I assume was perfectly properly employed) upon the ground that Mr. May in concert with others was acting upon the board of the corporation by whom the responsibility of employing a solicitor was to be discharged. Suppose the company in general meeting had appointed the solicitor and that Mr. May as a member of the corporation had voted at the meeting, he could have taken and have retained the profit costs. This flows from the principle of *North West Transportation Co.* v. *Beatty*. (1) In investigating whether the payment was reasonably and properly made as between Mr. Bath and the company the fact that a director or a member was appointed solicitor may be a fact which increases the onus upon the company of maintaining that the appointment was properly made: *Farrar* v. *Farrars, Ld.* (2); but it goes no further than that. It is a fallacy to say that every sum received by a director which he would not have received if he had not been a director is a sum for which he is responsible to the company of which he is a director: *In re Dover Coalfield Extension, Ld.* (3) Under the articles of association of this company Mr. May can, as between himself and the company, properly take and retain his

(1) (1887) 12 App. Cas. 589. (2) 40 Ch. D. 395.
(3) [1908] 1 Ch. 65.

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profit costs. The effect of the declaration under appeal is that a sum which the company have properly paid to a person who is, as between himself and the company, entitled to retain it is a sum which ought to be disallowed as between the company and their cestui que trust. There is a decision in the Irish Court of *Kavanagh* v. *Workingman's Benefit Building Society* (1), which certainly goes to support this view, but before dealing with that case I will say a word as to *Nicholson* v. *Tutin* (2), upon which it would seem to me that the judges in Ireland were basing their decision. In *Nicholson* v. *Tutin* (2) the trustees of the creditors' deed, of whom one Watson was one, were entitled in that character to property which was in mortgage. The mortgagees appointed Watson receiver. The suit was one to execute the trusts of the creditors' deed. The question was whether Watson, as between himself and his cestuis que trust, could charge commission for collecting the rents. Page Wood V.-C. held that he could not, and for this reason, that the mortgagees were entitled only to appoint a receiver at a commission in one of two events—either, first, if it was necessary so to do, or, secondly, if the mortgagor agreed. The persons to determine whether there was a necessity or whether such a contract should be made would be the trustees, of whom Watson was one. His duty to his cestuis que trust under the deed was therefore in conflict with his interest, and it followed that he could not retain the commission.

In *Kavanagh* v. *Workingman's Benefit Building Society* (1) it would seem that the judges in the Irish Court thought they were applying the doctrine of *Nicholson* v. *Tutin*. (2) In my opinion the principle of that case had there no application. The mortgagor there had agreed, for the mortgage conferred upon the mortgagees power to appoint a receiver. Whether the Court would have arrived at the same conclusion if this had been pointed out I do not know. Starting from this point the Court seems to have affirmed the existence of a relation between the director of the contracting company and the other party to the contract. With great respect to the Irish Court I am unable to see that the decision is right in principle. In joining as a director in the appointment of himself as receiver John Maher

(1) [1896] 1 I. R. 56. (2) 3 K. & J. 159.

was not acting in any matter in which he owed a duty to the mortgagor. His duty in the matter was solely to the company whose director he was. In the exercise of the power the mortgagor was the actor, and none the less because he was acting through the company in whom he had vested the power. I cannot follow Barry L.J. in saying that the director is a part of the corporation. There are no parts of a corporation. The corporator is not part of but is a wholly different person in law from the corporation of which he is a member. Nor can I follow FitzGibbon L.J. in saying that the director stands in a fiduciary relation to the mortgagor.

I have dealt only by way of illustration with the case of Mr. May the solicitor. The same principles upon the general question apply to the case of Mr. Snelling, the auctioneer, and Mr. Corke, the manager of the gravel pits. As regards all of them it will be open to Mr. Bath to contend, if the facts justify it, that the employment was unnecessary or improper in that, for instance, it was for the render of a service which the company were themselves bound to render and for which they had already received payment in the benefits coming to them under the agreement. The fact that directors were employed may throw upon the company a heavier onus in justifying both the employment and the charges. But a declaration that the remuneration is to be disallowed on the mere ground that the recipient was a director is in my judgment erroneous. I will only add that the question whether a director could have bought if the corporation had sold the properties or could have made or retained any advantage in any similar transaction does not arise and is not involved in anything which I have said. In my judgment the second declaration must be struck out. In taking the accounts it will remain perfectly open to Mr. Bath to challenge any disbursement which the defendants claim upon the footing that it was not properly incurred for the benefit of the purposes of the trust. As the appeal partly succeeds and partly fails there should, I think, be no costs.

Solicitors: *May, Sykes & Co.; Stones, Morris & Stone.*

W. C. D.

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March 25, 27.

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[1909 S. 156.]

Highway — Liability to repair ratione tenuræ — Agreement with Local Authority to take over Liability in Perpetuity—Validity—Public Health Act, 1875 (38 *& 39 Vict. c.* 55), *s.* 148—*Local Government Act*, 1894 (56 *& 57 Vict. c.* 73), *s.* 25—"*Incumbrance*"—*Settled Land Act*, 1882 (45 *& 46 Vict. c.* 38), *s.* 21, *sub-s.* (ii.).

By s. 148 of the Public Health Act, 1875, urban authorities were empowered by agreement with any person liable to repair a street or road to take on themselves the maintenance, repair, cleansing or watering of any such street or road on such terms as they and such person might agree on.

By s. 25 of the Local Government Act, 1894, that power was transferred to rural district councils:—

Held, that under s. 148 a rural district council were entitled to agree with a person liable to repair a highway ratione tenuræ to take on themselves in perpetuity in consideration of a money payment the liability for the maintenance and repair of the highway, and that the effect of such agreement would be to effectually free and for ever discharge the land and the owner and occupier thereof from that liability.

Dictum of Cockburn C.J. in *Nutter* v. *Accrington Local Board of Health* (1878) 4 Q. B. D. 379, explained and distinguished.

Quære, whether a liability to repair a highway ratione tenuræ on settled land is an incumbrance within the meaning of s. 21, sub-s. (ii.), of the Settled Land Act, 1882.

Adjourned Summons.

The testator, the seventh Earl of Stamford and Warrington, was at the time of his death possessed of four estates known as the Staffordshire estate, the Leicestershire estate, the Cheshire estate, and the Lancashire estate.

By his will, dated June 26, 1875, after giving a life interest in all four estates to his widow, he settled the Staffordshire estate, the Leicestershire estate, and the Cheshire estate to different uses in strict settlement. He settled the Lancashire estate by limiting it to trustees for a term of 1000 years, the trusts of that term being out of the rents and profits to discharge mortgages and incumbrances on the other estates in the following order: Staffordshire first, then Leicestershire, then Cheshire, and

lastly Lancashire itself. Subject to that term the Lancashire estate was settled, one moiety to the uses declared of the Staffordshire estate, and the other moiety to the uses declared of the Leicestershire estate. Under the trusts of the term very wide powers of management in regard to the Lancashire estate were conferred upon the trustees, and amongst others a power "to make allowances and arrangements with tenants and to accept surrenders of leases and tenancies and out of the rents and profits to pay all costs and expenses of insurance repairs and other outgoings and all other costs and expenses of care management cultivation and improvement and generally to do or cause to be done all such acts deeds matters and things respecting the care management cultivation and improvement of the same settled estate or to concur in any of the acts and things aforesaid in such manner as they or he could or might do if they or he were the owners or occupiers thereof."

The testator died on January 2, 1883, and his widow died on January 25, 1905.

Considerable portions of the lands comprised in the Lancashire estate were held subject to the liability to repair certain highways or parts of highways ratione tenuræ. One of these highways was situate within the district of the Limehouse Rural District Council. The highway being in a bad state of repair, the council had served notices upon the persons liable to repair the same to place it in proper repair. After considerable negotiation it was arranged between the council and the occupiers and the trustees, with the consent of Lady Catherine Sarah Grey and Mrs. Katharine Henrietta Venezia Grey, who together constituted the person having the powers of a tenant for life within the meaning of the Settled Land Acts, 1882 to 1890, of the Lancashire estate, that the council should do the then necessary repairs for the sum of 400*l.*, to be paid by the trustees, and that as to the permanent liability for future repairs a provisional agreement should be entered into, subject to the sanction of the Court, for transferring this liability to the council on payment by the trustees of a further sum of 500*l.* The necessary repairs were accordingly done by the council and were paid for by the trustees out of the rents and profits of the

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Lancashire estate. A provisional agreement dated November 12, 1908, for the transfer of the permanent liability was also entered into. It was made between the Limehouse Rural District Council of the first part, the tenants of the lands of the second part, the trustees of the third part, and Lady Grey and Mrs. Grey of the fourth part. The material clauses of the agreement were the following:

Clause 1. "The council will for ever hereafter take upon themselves the liability for the maintenance and repair of the several portions of the said highway hereinbefore described and delineated on the said plan and the same several portions of the said highway shall henceforth cease to be repairable ratione tenuræ by the owners or occupiers of the said lands."

Clause 2. "In consideration therefor the trustees at the request of the tenants and with the consent or by the direction of the said Catherine Sarah Grey and Katharine Henrietta Venezia Grey will pay to the council the sum of 500*l.* by five equal half-yearly instalments of 100*l.* each the first to be paid on or before the expiration of one calendar month after the final approval by the Court of this agreement or after the acceptance by the council of modifications of this agreement (if any) required by the Court (whichever shall last happen) and each subsequent instalment on or before the expiration of each subsequent six calendar months."

On January 13, 1909, the trustees of the will took out an originating summons for the determination of the questions—

(1.) Whether the plaintiffs as trustees of the will or the defendants Lady Grey and Mrs. Grey had power to apply or direct the application of capital moneys representing the Lancashire estate for the purpose of freeing and discharging the lands in question and the owners and occupiers thereof from the perpetual liability to repair highways ratione tenuræ, and, if not, whether the plaintiffs as trustees of the term had power to apply for the like purpose the rents and profits of the Lancashire estate.

(2.) Whether the provisional agreement of November 12, 1908, would, if carried out, either with or without any modifications, effectually free and for ever discharge the lands and the owners and occupiers thereof from such liability.

(3.) Whether the plaintiffs or the defendants Lady Grey and Mrs. Grey (as the case might be) were at liberty to carry into effect the provisional agreement and to pay or direct the payment of the sum of 500*l.* therein mentioned out of capital moneys representing the Lancashire estate or out of the rents and profits thereof, and, if so,

(4.) For an order that the provisional agreement might be approved and carried into effect.

On October 13, 1909, the summons was heard before Warrington J., who then expressed himself as prepared to sanction the agreement and the payment of the 500*l.* out of capital moneys as asked by the summons if and when proceedings were taken under the Highway Acts, 1835 and 1862, for converting the road into a highway repairable as a parish highway. The Limehouse Rural District Council were unwilling that proceedings should be taken under the Highway Acts, and at their request they were made defendants to the summons.

The summons was restored to the paper for re-argument and now came on to be heard.

A. L. Ellis, for the trustees of the will.

H. Terrell, K.C., and *E. J. Naldrett*, for the defendant council. The liability to repair a highway ratione tenuræ on the settled land is an incumbrance within s. 21, sub-s. (ii.), of the Settled Land Act, 1882, and may be discharged out of capital moneys: *In re Legh's Settled Estate*. (1) It is a liability which must from its nature have existed from time immemorial and it involves expenditure. If the person liable to repair the highway does not place it in proper repair the local authority may do so and recover from him the necessary expenses of so doing: Local Government Act, 1894, s. 25, sub-s. 2. The liability is on the land notwithstanding that the cost of the repairs may in the first instance have to be discharged by the occupier. It is a liability for all time and is therefore a charge or incumbrance on the land for all time.

Sect. 62 of the Highway Act, 1835, contains provisions for the compulsory transference of the liability to repair ratione tenuræ in the case of highways situated in separate highway parishes.

(1) [1902] 2 Ch. 274.

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Similar provisions for transference in the case of highways situated in highway districts are contained in s. 35 of the Highway Act, 1862. By the Public Health Act, 1875, s. 148 (1), urban authorities were empowered by agreement with any person liable to repair any street or road to "take on themselves the maintenance repair cleansing or watering of any such street or road." By the Local Government Act, 1894, s. 25, sub-s. 1 (2), there were transferred to rural district councils (inter alia) as respects highways all the powers, duties, and liabilities of an urban sanitary authority under ss. 144 to 148 of the Public Health Act, 1875.

The defendant council are a rural district council, and as such were, it is submitted, entitled to enter into the provisional agreement under the power conferred by s. 148 of the Act of 1875. It is suggested that the agreement would operate only as an

(1) Public Health Act, 1875, s. 148: "Any urban authority may by agreement with the trustees of any turnpike road, or with any person liable to repair any street or road, or any part thereof, or with the surveyor of any county bridge, take on themselves the maintenance repair cleansing or watering of any such street or road or any part thereof, or of any road over any county bridge, and the approaches thereto, or of any part of the said streets or roads within their district, and may remove any turnpike gates toll gates or bars which may be situated within their district, and may erect other turnpike gates toll gates or bars in lieu thereof, on such terms as the urban authority and such trustees or person or surveyor as aforesaid may agree on . . . ."

(2) Local Government Act, 1894, s. 25, sub-s. 1: "As from the appointed day, there shall be transferred to the district council of every rural district all the powers, duties, and liabilities of the rural sanitary authority in the district, and of any highway authority in the district, and highway boards shall cease to exist, and rural district councils shall be the successors of the rural sanitary authority and highway authority, and shall also have as respects highways all the powers, duties, and liabilities of an urban sanitary authority under sections one hundred and forty-four to one hundred and forty-eight of the Public Health Act, 1875, and those sections shall apply in the case of a rural district and of the council thereof in like manner as in the case of an urban district and an urban authority . . . ."

Sub-s. 2: "Where a highway repairable ratione tenuræ appears on the report of a competent surveyor not to be in proper repair, and the person liable to repair the same fails when requested so to do by the district council to place it in proper repair, the district council may place the highway in proper repair, and recover from the person liable to repair the highway the necessary expenses of so doing."

agreement inter partes. But that is not so. The words "take on themselves the maintenance, repair," &c., in the section are, it is submitted, equivalent to "take on themselves the liability to maintain and repair." The section also enables the local authority to remove toll bars, that is, to affect the land permanently. If the section is to be construed as only enabling the local authority to contract with the owner for the time being the effect will be to render it unworkable. The provisional agreement should be confirmed by the Court.

H. Terrell, K.C., and *Owen Thompson*, for Mrs. Grey, the tenant for life in possession, and Mrs. Butler, the tenant in tail of the Leicestershire estate and of one moiety of the Lancashire estate, adopted the same arguments.

Cave, K.C., and *W. R. Sheldon*, for Lady Grey, the tenant for life, and her infant son, the tenant in tail of the Staffordshire estate and of the other moiety of the Lancashire estate. We desire to support the agreement provided that the Court is satisfied that its effect will be permanently to free and discharge the estate from liability. There is, however, this difficulty. Under s. 148 the person with whom the local authority are to enter into an agreement is the "person liable to repair" the road, and the person liable to repair the highway ratione tenuræ is not the owner but the occupier of the land: *Cuckfield Rural Council* v. *Goring* (1); *Daventry Rural Council* v. *Parker*. (2)

[*H. Terrell, K.C.* But an occupier who has been called upon to pay may demand reimbursement from the owner: *Baker* v. *Greenhill*. (3)]

There is a further difficulty, whether a local authority by accepting a lump sum can bind themselves in perpetuity.

Clauson, K.C., and *H. T. Methold*, for the second tenant for life in remainder and an infant tenant in tail in remainder of the Leicestershire estate. The agreement would appear to be an advantageous one for the persons we represent if its effect would be to relieve the estate permanently from the liability to repair. But there is a possible construction of s. 148, and that is that the words "take on themselves the maintenance, repair,"

(1) [1898] 1 Q. B. 865. (2) [1900] 1 Q. B. 1.
(3) (1842) 3 Q. B. 148.

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&c., only enable the local authority to contract to do the work of keeping the roads in repair for the persons liable to repair them.

[*H. Terrell, K.C.* If that view of the section be the correct one, there would be two sections in the same Act dealing with the contracting for watering and cleansing the streets, for s. 42 also deals with that matter.]

Sect. 148 does no more than enable local authorities to enter into contracts. It does not give the occupier power to do more than affect his own rights. If, however, the Court is of opinion that the defendant council can enter into this agreement, there is the further difficulty that although the agreement would bind them it might not bind the inhabitants.

Then as to whether this liability is an "incumbrance" under s. 21, sub-s. (ii.), of the Settled Land Act, 1882, we ask the Court not to decide that point on the present summons, as our rights might thereby be prejudiced. The Act contains no definition of incumbrance, and the words of the sub-section are inappropriate to include a liability ratione tenuræ. Such a liability cannot be "redeemed."

[WARRINGTON J. I think the sub-section only refers to pecuniary burdens. This is a pecuniary burden inasmuch as it cannot be discharged without putting one's hand in one's pocket.]

It is submitted that "incumbrance" in the sub-section is used as equivalent to "mortgage."

[*Cave, K.C.* In *Egg* v. *Blayney* (1) expenses of paving a new street apportioned under s. 77 of the Metropolis Management Amendment Act, 1862, were held not to be an incumbrance upon the property in respect of which they were payable.]

[They also referred to *Rex* v. *Loxdale.* (2)]

T. J. C. Tomlin, for the infant tenant in tail of the Cheshire estate. If s. 148 enables the defendant council to take over the liability to repair they can only take over the liability of the person with whom they are contracting. If they take over more than this they may be acting ultra vires. It is submitted that the true construction of the section is that it enables the local authority to agree with the person liable to repair to take on

(1) (1888) 21 Q. B. D. 107. (2) (1758) 1 Burr. 445, 447.

themselves the physical work of doing the repairs. The power of the local authority under the section is only to take on themselves a liability which is co-extensive with the liability of the person with whom they contract: *Nutter* v. *Accrington Local Board of Health.* (1) That was a decision on the construction of s. 41 of the Local Government Act, 1858, but the words of that section were practically identical with those of s. 148 of the Act of 1875. It is true that the statement of Cockburn C.J. in that case was only a dictum and that the case was reversed upon appeal, but the dictum was unaffected.

Further, it is submitted, a liability to repair ratione tenuræ is clearly not a charge on the land within the meaning of s. 21, sub-s. (ii.), of the Settled Land Act, 1882.

H. Terrell, K.C., in reply. It cannot have been the intention of the Legislature to limit s. 148 to dealing with temporary matters only, such as watering and cleansing, and to exclude permanent matters, such as repairs and maintenance. If that were so, the section would for practical purposes be useless. Local authorities could not make contracts to continue for a fixed period of time. Take for example the case of a tenant from year to year, the local authority could only enter into an agreement to last so long as he was in occupation of the land. So too in the case of a tenant for life in possession the same observation would apply, and if the contention which has been put forward is right, inasmuch as his liability to repair would last only so long as he remained in possession, if he let the land on the day following the execution of the agreement, the agreement would be at an end. The manifest intention of the Legislature was to secure one uniform scheme for repairing all the highways in the parish, and the object of s. 148 was to enable this to be done by authorizing the local authority to enter into permanent agreements for this purpose. In thus enabling the local authority to enter into these agreements the Legislature trusted them to get a quid pro quo in exchange.

Although the occupier is the person who is indictable for non-repair, it is the owner of the land upon whom the burden ultimately falls: *Baker* v. *Greenhill.* (2) The liability ratione

(1) 4 Q. B. D. 375, 379.

(2) 3 Q. B. 148.

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tenuræ is one which attaches to the whole of the land and to every portion of it: *London and North Western Ry. Co.* v. *Fobbing Levels Commissioners of Sewers* (1); and although it is the occupier from whom the cost of repairs is recoverable by the local authority, the occupier is entitled to be reimbursed by the owner what he has been called upon to pay: *Reg.* v. *Baker.* (2)

WARRINGTON J. stated the nature of the application and, referring shortly to the facts, said that the power of management conferred on the trustees was in about as wide terms as such a power could well be couched. He continued:—The real question is whether the payment of the 500*l.* by the trustees in pursuance of the agreement will have the effect of freeing the estate for ever from the liability to repair, because, if the estate would not be so freed, it must be conceded that the trustees would not be justified in spending that money out of capital. It is suggested by some of the parties that the effect of the payment under the agreement will not be to discharge the land for ever, because, they contend, it may hereafter be said that such an agreement was not within the powers of the defendant council. Whether or not the agreement is within the powers of the defendant council is the main question which I have to determine.

The liability to repair a highway ratione tenuræ is a liability which is imposed upon the land. The person against whom the public can enforce that liability is the occupier, and the occupier only. In old days the only means by which that liability could be enforced was by indictment of the occupier. Now that liability can be enforced in a different way, because under the recent Local Government Acts a highway authority, which is now the rural district council, can do the work and recover the expense from the occupier. But, while the occupier is the person who is responsible to the public for the repair of the highway, he, in his turn, could always recover the money which he had been forced to pay from the owner of the land, in the absence of any contract between himself and the owner which

(1) (1896) 66 L. J. (Q.B.) 127, 131. (2) (1890) 25 Q. B. D. 213.

would preclude him from so doing. Those are the positions of the occupier and the owner respectively.

It has been determined by the Court of Appeal in *Daventry Rural Council* v. *Parker* (1) that, in that part of the Local Government Act, 1894, in which provision is made for the recovery from the person liable to repair the highway of the moneys expended by the rural district council in repairing it, the person from whom the money is recoverable is the occupier, and the occupier only—that is to say, that in s. 25 "the person liable to repair the highway" means the person who is liable to the public for the repair, and not the person who as between himself and the occupier may have to indemnify the occupier. In this case the defendant council are the successors of the highway authority under the Highway Act, 1835. Under that Act there was power (s. 62) by proceedings before the justices, instituted either by the person who was liable ratione tenuræ or by the surveyor of the parish, to convert a highway repairable by a person ratione tenuræ into a highway repairable by the inhabitants at large. There is a similar provision made by the Highway Act, 1862, s. 35, in reference to highways situate within a highway district. Those provisions all had reference to the mode in which, adversely to one or other of the parties concerned, a conversion might be made.

The defendant council are a rural district council governed by the Local Government Acts, and the present statute which is applicable is the Local Government Act, 1894. By s. 25, sub-s. 1, of that Act, the district council of the rural district are made the successors of the highway authority, and there is contained a provision—which is the only one of importance for the present purpose—that the rural district council "shall also have as respects highways all the powers, duties, and liabilities of an urban sanitary authority under sections 144 to 148 of the Public Health Act, 1875, and those sections shall apply in the case of a rural district and of the council thereof in like manner as in the case of an urban district and an urban authority." Therefore in order to see what are the powers of the defendant council I have to turn to the Public Health Act, 1875. The only section which

(1) [1900] 1 Q. B. 1.

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is material is s. 148, which provides: [His Lordship read the section, and continued.] That is the power under which the defendant council in this case have purported to act.

I must now refer to the actual agreement of November 12, 1908, which is made by the defendant council with both the owners and occupiers and the trustees to see what it is which they have purported to do, and whether what they have purported to do is within the powers of the Act. The first clause provides as follows: "The council will for ever hereafter take upon themselves the liability for the maintenance and repair of the several portions of the said highway hereinbefore described and delineated on the said plan and the same several portions of the said highway shall henceforth cease to be repairable ratione tenuræ by the owners or occupiers of the said lands." That is the stipulation of the defendant council, and the question is, Is it or is it not effective?

It is said on the one hand that s. 148 provides a mode whereby without compulsion on either party a highway repairable by a person ratione tenuræ may be converted into a highway repairable by the inhabitants at large; that it supplements the previous provisions of the two Highway Acts of 1835 and 1862, and that the reason for the introduction of the new mode of converting a highway is that the power of doing this by agreement is now entrusted to a representative body; that, inasmuch as by the earlier Acts the person who represented the public was not a representative body like the defendant council, it was thought undesirable that the power should be committed to him, but rather that it should be entrusted to the justices; and that, now, under the Public Health Acts, the highway authority being a representative body, there is no objection to entrusting that power to them. On the other hand it is said that the provisions of the section have a more limited application, and that all that the section does is to enable the local authority to contract with the occupier to do the actual physical work of repairing the highway for him, and that it does not enable the local authority, here the defendant council, to bind themselves for all time to do the work. I have to decide which of those two contentions is the right one.

In the first place, there are under the section three classes of

persons with whom the local authority are authorized to enter into an agreement, first the trustees of turnpike roads, secondly (and I am not taking them in the order in which they are mentioned in the section) the surveyors of county bridges, and thirdly "any person liable to repair any street or road." With regard to the first two classes, the liability of the parties with whom the local authority may contract is a permanent liability, that is, the liability is one which is not limited by any definite period of time. The power to agree and the terms in which the agreement is described are identical in regard to all the three classes. What the local authority are authorized to do is to "take on themselves the maintenance, repair, cleansing or watering of any such street or road or any part thereof." Prima facie I should have thought that the words used were very appropriate if it was intended to cast upon the local authority the liability to maintain and repair. It is said that the words do not do that, but only enable the local authority to contract to do the repairs from time to time. I think that, if that was all that was intended, much more limited words would have been used. When one sees that in regard to the first two classes the liability which is involved is a permanent one, it would seem that it is also a permanent one in the third class.

But there is a difficulty in regard to highways repairable ratione tenuræ in the fact that the person liable is the occupier. If the words of the section have the meaning contended for by the defendant council, the result is that a local authority are authorized to contract with an occupier whose term of occupation may be of the shortest duration. But there is a difficulty also if the section is so construed that the power is only a limited one, because the term of occupation might be so short that the local authority would never know whether they might have to do the work or not. In some cases it would be futile to enter into an agreement with the occupier under those conditions. The other difficulty, the one first suggested, is the lesser of the two and is not insuperable. The occupier is the person liable, and the section says to the local authority "You may make an agreement with the occupier," but no local authority would make an agreement with the occupier which involved a liability on

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the owner unless they had also the consent of the owner, and before the local authority could make any such agreement the owner would have to be a party.

The conclusion at which I should arrive if I were free to act upon my own view is that the section does give to the local authority power to contract and to take on themselves the liability to maintain and repair the highway for the future, but that it leaves it open to the council to require the owner to come in. I think the section does give the council that power. If that is so, the question whether the technical liability to indictment remains or not is of no importance, though I do not think that it does remain. I think that the section means that the other party shall be discharged.

But am I bound by authority to hold otherwise? The only authority upon the meaning of the words "person liable to repair" which has given me any trouble is a dictum of Cockburn C.J. in *Nutter* v. *Accrington Local Board of Health.* (1) In that case the learned judge had to deal with s. 41 of the Local Government Act, 1858, which was in terms practically identical with s. 148 of the Act of 1875. He says: "Then in the Act of 1858 (21 & 22 Vict. c. 98) the local board is authorized to enter into agreements with trustees of turnpike roads, or other persons liable to repair highways, to take upon themselves the maintenance and repair of such highways. I think the powers and liabilities they may take upon themselves under such agreements can only be such as are co-extensive with those of the person or authority whose powers and liabilities they accept and which are transferred to them." At first sight that would appear to mean that the view of Cockburn C.J. was that, if the local board were contracting with an occupier, all they could take upon themselves was the liability of the individual occupier. But, as has been often said, it is a dangerous thing to take the particular words of a judge without reference to the context in which they occur and apply them to a matter foreign to that with which he was dealing. It is necessary therefore to see what the case was with which the Lord Chief Justice was there dealing. The persons liable to repair were trustees of a turnpike road and not persons

(1) 4 Q. B. D. 375, 379.

liable to repair ratione tenuræ. What the local authority had done was to agree to take over the liability to repair the footway as distinct from the liability to repair the carriageway, and the question with which the Lord Chief Justice was there dealing was whether or not it was competent to the local authority to divide the liability. And he held that it was not, and that all that the local authority could do was to transfer the whole liability of the one party to the other. When the facts of that case are known, it will be seen that the words do not bear the meaning which it has been suggested they do and which at first sight they appear to bear. The Lord Chief Justice was dealing with the facts of the particular case before him, and I think that what he meant was that the local authority must take over the whole liability or none. That, to my mind, is made clear by the judgment of Mellor J. The decision in that case was reversed by the Court of Appeal, Bramwell L.J. dissenting, but in the judgment of Cotton L.J. the point is put extremely clearly, and, after what he said, I cannot now regard the dictum of Cockburn C.J. as governing the case before me.

I decide, therefore, that the agreement was not ultra vires the rural district council, and that it will, if carried out, effectually discharge the land from the liability to repair.

The next question is whether the trustees can apply, or the persons constituting the person having the powers of a tenant for life can direct the application of, capital moneys for the purpose of carrying out the agreement. It has been argued on behalf of the latter that this liability to repair is an incumbrance affecting the inheritance of the settled land within the meaning of s. 21, sub-s. (ii.), of the Settled Land Act, 1882, and can therefore under that section be discharged out of capital moneys. I am not at present satisfied that the liability is an incumbrance within the section, but it is not, in my opinion, necessary to decide that point, and I do not propose to do so, and I will assume that it is not an incumbrance within the section. The matter, however, does not rest there, for, notwithstanding that assumption, the trustees may yet have the right under their extensive powers of management to make this payment out of capital moneys. I think they have that right. In my opinion the only question I have to consider is whether what

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they propose to do is what a judicious owner would do. I think it is. Everybody agrees that, if the trustees have power to do it, it would be a very judicious thing for them to do.

In my opinion, therefore, the proper answer to the first question is that the trustees have power to apply capital moneys for the purpose of freeing and discharging the lands, and the owners and occupiers, from the perpetual liability to repair highways ratione tenuræ. The answers to the next questions will be that the provisional agreement will, if carried out, effectually free and for ever discharge the lands, and the owners and occupiers, from such liability, and that the trustees are at liberty to carry the agreement into effect and to pay the 500*l.* out of capital moneys. And there will be an order that the agreement be carried out accordingly.

Solicitors: *Bower, Cotton & Bower; Burgess, Cosens & Co., for Taylor & Buckley, Ashton-under-Lyne; Smith, Fawdon & Low, for Wright, Son & Aysom, Leicester; Maples, Teesdale & Co., for Lord & Parker, Worcester; Foyer & Co.; Trower, Still & Co.*

W. I. C.

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In re TOWNDROW.
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[1905 T. 987.]

Trustee—Specific Legatee—Residue—Distinct Trusts—Default in respect of Residue—Making good Default—Assignees from Trustee—Specific Legacy not liable.

An executor and trustee, who was absolutely entitled to a specific legacy subject only to prior life interests therein, was also trustee of the residuary personal estate, which was settled upon trusts under which he took no beneficial interest whatever. He settled part of the legacy while still reversionary and mortgaged the other part. Several years afterwards he misappropriated part of the residue. The legacy having fallen into possession and been transferred into Court in the course of an action for the execution of the trusts of the will, the residuary legatees sought to attach the legacy to make good the default in respect of the residue:—

Held, that the rule that a defaulting trustee cannot claim any share in the trust estate until he has made good his default inasmuch as he must be treated as having by anticipation received or retained pay-

ment of his share, did not apply to the present case, because the trustee was not entitled to any share or interest in the residue; and that, as the specific legacy and residue were held upon entirely distinct trusts, one fund was not liable to indemnify the other, and the trustee's assignees were, therefore, entitled to the whole legacy free from any lien or equity in respect of the default.

THIS was the further consideration of an action for the execution of the trusts of the will of the above-mentioned testator commenced by the plaintiff, as assignee of a share of residue and of part of a specific legacy, against the defendant who was the surviving trustee of the will.

During the course of the action the plaintiff had obtained the transfer into Court of a sum of 618*l.* 14*s.* 9*d.* Consols, previously standing in the sole name of the defendant, which represented the proceeds of sale of the undistributed portion of a specific trust legacy bequeathed by the testator to the defendant absolutely, subject only to two life interests both of which had determined. The defendant had settled part of the legacy upon his wife and children and had mortgaged the remainder of it to the plaintiff. By his certificate the Master had found (inter alia) that in June, 1896, the defendant had converted to his own use the sum of 250*l.*, constituting the only residuary personal estate of the testator, which together with his real estate had been given by the testator to the trustees of the will upon certain trusts under which the defendant took no beneficial interest whatever. The real estate and the residuary personal estate had upon the dropping of the last life interest therein in 1904 become divisible in two equal shares, one moiety having in the events which had happened become absolutely vested in the defendant's brother Edward Machen, who had previously mortgaged his interest therein to the plaintiff, and the other moiety in the respondents the children of a deceased brother, Joseph Machen.

The question which arose for determination was whether the moneys in Court representing the specific legacy could be attached to make good the default of the defendant in respect of the residuary personal estate.

The facts more fully stated were as follows :—

The testator died in 1855. By his will and codicil he had bequeathed all his shares in the Chesterfield Gas and Waterworks

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Company to his executors and trustees, who were his wife, Joseph Shipton, and the defendant, upon trust to pay the income thereof to his wife for life, and after her death to pay the income of one moiety thereof to Elizabeth Machen for life, and, subject thereto, upon trust to transfer the said shares to the defendant, his executors, administrators, and assigns. He devised and bequeathed his real estate and other his personal estate to his trustees upon trust to pay the income thereof to his wife for life, and after her death to Elizabeth Machen for life, and, subject thereto, upon trusts under which the same became divisible in two equal shares as above mentioned.

Shortly after his death the testator's shares in the Chesterfield Company were converted into 700*l.* ordinary stock and 500*l.* guaranteed stock.

By a post-nuptial settlement dated February 24, 1870, and expressed to be made in consideration of natural love and affection, the defendant assigned to the trustees thereof (one of whom was his co-executor Joseph Shipton) the 700*l.* ordinary stock in the Chesterfield Company, to hold, subject to the respective life interests therein of the testator's widow and Elizabeth Machen, upon trust to pay the income thereof to the defendant's wife, Anne Machen, for life, and after her death to the defendant for life, and, subject thereto, upon trust in the events which happened for their two daughters Beatrice Elizabeth Machen and Annie Louisa Machen in equal shares.

Evidence had been filed which went to shew that the settlement was in fact made in return for money advanced to the defendant by his wife out of her separate estate.

In 1880 the defendant assigned (inter alia) his reversionary interest in the 500*l.* guaranteed stock in the Chesterfield Company and also his reversionary life interest under the above-mentioned settlement in the 700*l.* ordinary stock to the plaintiff and another by way of mortgage to secure 500*l.* and interest, and this mortgage and a further charge created in 1881 were now vested in the plaintiff alone.

In 1881 the plaintiff and G. W. Lancaster were duly appointed trustees of the settlement in place of the original trustees, both of whom had died.

In 1885 the testator's widow died, and one moiety of the guaranteed stock which then fell into possession was sold and paid to the plaintiff in respect of his mortgage.

In 1896 the Chesterfield Company was wound up and its undertaking taken over by another corporation. Thereupon 490*l.*, representing the one moiety of the ordinary stock which had fallen into possession in 1885 on the testator's widow's death, was paid to the trustees of the settlement; and the sums of 490*l.*, representing the other moiety of the ordinary stock, and 212*l.* 10*s.*, representing the balance of the guaranteed stock (both of which were still subject to the life interest of Elizabeth Machen), were received by the defendant as surviving trustee of the will and invested in the purchase of 618*l.* 14*s.* 9*d.* Consols.

In October, 1904, Elizabeth Machen died.

In July, 1905, the plaintiff commenced this action by originating summons. The trusts of the will were ordered to be carried into execution, accounts and inquiries were directed, and a receiver appointed.

The defendant was old and in bad health and neglected to furnish accounts or answer the inquiries. The Master's certificate, which was based upon information supplied by the plaintiff's son and solicitor, besides finding the defendant in default to the extent of 250*l.* in respect of the residuary personal estate, found that the only part of the testator's personal estate outstanding or undisposed of consisted of the sum of 618*l.* 14*s.* 9*d.* Consols above mentioned, which was subsequently, upon the plaintiff's application, ordered to be, and was, transferred into Court.

G. W. Lancaster, the plaintiff's co-trustee of the settlement, was not a party to the action. In 1908, in consequence of the plaintiff having throughout the proceedings ignored the claims of the beneficiaries under the settlement, Anne Machen and her daughters—upon none of whom had any of the orders or the Master's certificate been served—obtained a stop order on the fund in Court.

The real estate having been sold and the proceeds paid into Court, the action now came on for further consideration.

In the interval Anne Machen had died.

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A. Grant, K.C., and *St. John Clerke*, for the plaintiff. The sum of Consols in Court represents the undistributed portion of the specific legacy, and, apart from any question of the defendant's default, seven-tenths of that sum are subject to the settlement of 1870, and the remaining three-tenths are subject to the mortgage to the plaintiff, who is also mortgagee of one moiety of the real estate and residuary personal estate. But we submit that the assignees take subject to all equities and that the defendant's default in respect of the residuary estate must be made good out of the specific legacy before he or his assignees can take any part of it.

The principle that a trustee must first make good his default before he can take any portion of the trust estate was stated very clearly and applied by Stirling J. in *Doering* v. *Doering* (1) and by Sir George Jessel M.R. in *Jacubs* v. *Rylance*. (2)

[PARKER J. The real principle is that where there is an aggregate fund in which the trustee is beneficially interested and to which he owes something, he must be taken to have paid himself that amount on account of his share. It has been held, in the converse case, that a trustee's right of indemnity is confined to the same trust fund in respect of which the right to indemnity arises: *Fraser* v. *Murdoch*. (3)]

We submit that the trustee is a trustee of the whole estate in respect of every beneficiary. He is the fountain head and must do equity to all the beneficiaries under the will. That clearly appears from the decision in *Doering* v. *Doering*. (1)

Dighton Pollock, for the respondents the children of Joseph Machen. The principle exemplified in *Doering* v. *Doering* (1) is not a question of indemnity, but a question whether a defaulting trustee is entitled to get any benefit at all out of the trust estate without making good his default. The defendant has this specific legacy and it is possible for him to make good his default out of it, and it would not be equitable to allow him to take the legacy without first making good his default. His assignees are in no better position. The money still remains in a position in which it can be attached, and I submit that the Court ought to retain it for the purpose of making good the default.

(1) (1889) 42 Ch. D. 203. (2) (1874) L. R. 17 Eq. 341.
(3) (1881) 6 App. Cas. 855.

Romer, K.C., and *R. J. A. Morrison*, for the respondents the daughters entitled in reversion to the settlement funds. We submit that we are entitled to have a proper proportionate part of the Consols transferred out of Court to the trustees of the settlement without any deduction in respect of the alleged default. These respondents are not bound by the Master's finding, as his certificate has never been served on them.

The specific legacy was a totally distinct fund held on entirely different trusts from those of the residue, and was assented to at least forty years ago by the testator's executors. The alleged default is stated to have occurred twenty-six years after the date of the settlement. The principle of *Doering* v. *Doering* (1) only applies where the default relates to the same trust fund which is being distributed and in which the defaulting trustee claims an interest, and not to a case like this.

J. M. Gover, for the defendant W. Machen.

PARKER J. The only point which I have to decide in this case relates to the interests of Mr. Romer's clients as assignees of a specific legacy.

The testator's will and codicil gave certain property upon specific trusts under which, subject as to the whole to one life interest, and as to one half to another life interest, the property in question, which consisted of certain shares in the Chesterfield Gas and Waterworks Company, now represented by the sum of 618*l.* 14*s.* 9*d.* Consols in Court, was left to William Machen, one of the trustees of the will, absolutely. The real and residuary personal estate were devised and bequeathed to the trustees upon trust for two successive tenants for life, and subject thereto for a certain class of persons from which William Machen was expressly excluded.

I think there can be no doubt, having regard to the lapse of time and otherwise, that the specific legacy of the shares was assented to by the executors of the will, and that the trustees held it on a set of trusts which were absolutely distinct from the set of trusts on which the rest of the testator's estate was held. So that I have one set of trusts of one fund in which one of the

(1) 42 Ch. D. 203.

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trustees had a reversionary interest, and I have another set of trusts of another fund in which he took no beneficial interest whatever.

The trustee William Machen, who was interested in the specific legacy, became in course of time sole trustee of the will and of both sets of trusts, and while he was sole trustee he appears, according to the Master's certificate, to have misappropriated a portion of the residuary estate to the extent of 250*l.* Before he did that he had assigned the specific legacy as to a portion by way of mortgage to the plaintiff, and as to another portion to the trustees of a settlement which was made after his marriage and as to which it is doubtful whether there was consideration or not. He himself took a reversionary life interest under that settlement.

The question which I have to decide is a short one, namely, whether the ordinary principle that a trustee can take no share out of a trust fund without making good to that trust fund the amount he has misappropriated out of it—a principle which undoubtedly applies to the assignees of the trustee as well as to the trustee himself—applies as well to another fund under the same will in respect of which there has been no default at all.

I think that the real principle is stated by Stirling J. in *Doering* v. *Doering* (1) where he says, "The law has gone to this extent, that though the breach of trust is committed after the assignment, nevertheless, the rule applies, and the assignee or mortgagee is not entitled to any share in the estate until the default is made good. The theory on which that rule is based is that the Court treats the trustee as having received his share by anticipation, and the answer to any claim made by the trustee is this: 'You have already received your share; you have it in your own hands.'" Therefore you must, I take it, have a defaulting trustee claiming a share in the aggregate amount of a certain fund, and the answer to him is, "You cannot have it; you have already had it." But that cannot apply to a case like the present, where the only interest which the trustee has is in another fund in which the cestuis que trust whose property has been misappropriated have no

(1) 42 Ch. D. 203, 207.

interest at all; it cannot apply so as to give them a lien on that other fund. The trustee in this case is not claiming a share in the residue, and, therefore, his default has no effect on the distribution of that residue, and, in my opinion, his assigns under the settlement, there being no default at the date of the assignment, take clear of and are entitled to hold the settled fund free from any equity against them. That applies also to his mortgagee.

I hold, therefore, that Mr. Romer's clients are entitled to have their proportion of the Consols transferred out of Court to the trustees of their settlement, and to have their costs provided for out of the residuary estate.

Solicitors: *Field, Roscoe & Co., for H. S. Gratton, Chesterfield; Peacock & Goddard, for Clifton, Son & Smith, Nottingham; Jaques & Co., for Turnbull & Sons, Scarborough.*

F. E.

MILLS *v.* UNITED COUNTIES BANK, LIMITED.

[1910 M. 2049.]

Mortgage—Contingent Reversionary Interest—Equity of Redemption—Purchase—Implied Liability of Purchaser to indemnify Vendor against Mortgage Debt—Interest vesting in Possession—Express Indemnity—Exclusion of implied Indemnity.

The rule in equity which, in the absence of express contract to the contrary, throws upon the purchaser of an equity of redemption the implied obligation of indemnifying the vendor against the mortgage debt, is conditional upon the interest vesting in possession; and until that event has happened the person claiming the benefit of the implied covenant cannot sue.

Waring v. *Ward* (1802) 7 Ves. 332, 336, followed.

Where the deed of assignment of an equity of redemption provides for an express and limited indemnity, the fuller indemnity which might otherwise be implied is excluded.

UNDER the will of his father, Joseph Mills, who died on December 17, 1889, the plaintiff, Charles Frederick Mills, was entitled to one eleventh share of the testator's real estate in reversion, expectant upon the death or second marriage of the testator's widow, Harriet Mills, and contingently upon his being

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alive at the date of such death or second marriage. The plaintiff's share was susceptible of augmentation by the death of any other of the testator's children without issue before the death or second marriage of the widow.

On October 30, 1902, the firm of R. Mills & Co., of which the plaintiff was a member, was very heavily indebted to the defendants, the United Counties Bank, Limited. At that time the plaintiff's contingent interest, including his interest in anything which might accrue thereto, was in mortgage, first, to the bank, under two deeds dated respectively June 24, 1897, and November 21, 1898, to secure principal moneys owing by the firm of R. Mills & Co., to an amount not exceeding 10,000*l.* and interest, and, secondly, to his father-in-law, John Mobberley, under a deed dated March 14, 1899, to secure a sum of 2000*l.*, advanced to the plaintiff individually, and interest thereon at 3½ per cent. The mortgages to the bank included policies of assurance on the lives of the members of the firm of R. Mills & Co. of the then surrender value of 700*l.* or thereabouts.

The bank having commenced an action against the plaintiff and his co-partners to recover the moneys so owing by them, an agreement was come to for staying the action and distributing or dividing the indebtedness among the partners, and for rearranging the several securities held by the bank. This agreement included the purchase by the bank of the equity of redemption in the plaintiff's one eleventh contingent reversionary share, but not in anything which might accrue thereto. On the contrary, any interest which might attach to the plaintiff's eleventh share by way of accruer was, as between the plaintiff and the bank, to belong to the plaintiff, freed from the mortgages to the bank and to J. Mobberley. This agreement was carried into effect by an indenture of assignment dated October 30, 1902, made between the plaintiff and his two brothers, as parties of the first three parts, and the bank. By this deed, after reciting the agreement for the absolute sale by the three brothers of their respective reversionary interests in one eleventh part each of the residuary estate of J. Mills, and that the existing charges to the bank should be kept alive, but only for the protection of the bank against the subsequent charge of J. Mobberley, and also

reciting that it was intended that the policies of assurance mortgaged to the bank should be surrendered by the bank, and they should retain the moneys thereby obtained and effect new insurances on the lives of the first three parties for the bank's benefit, and at their own expense, it was witnessed that, in consideration of the sum of 2000*l.* paid to the parties of the first three parts in the proportions there mentioned (the plaintiff receiving 666*l.* 13*s.* 4*d.*), each of them assigned his contingent reversionary interest in one equal eleventh part or share in the residuary real and personal estate of J. Mills to the bank, freed and discharged from the equity of redemption of the same parties under the mortgage of June 24, 1897, and the further charge of November 21, 1898, but subject to the moneys then owing on these securities which were intended to be kept alive, and subject also as to the share of the plaintiff to the second mortgage to J. Mobberley of March 14, 1899, and the principal sum of 2000*l.* and interest thereby secured, and subject to the payment by the bank of all duties payable to the Inland Revenue authorities upon the shares and interests thereby assigned; and it was declared that the mortgages to the bank should not merge in the equity of redemption in the shares thereby assigned, but remain and be kept on foot as a charge on the shares so as to protect the bank so far as regarded the share of the plaintiff against all moneys owing by him to J. Mobberley, but for no other purpose; and it was also by the deed agreed and declared, inter alia, that, upon the share and interest of the plaintiff in the residuary real and personal estate of J. Mills being paid over or realized, the bank should, in the first place, retain out of such share, or the proceeds thereof, the sum of 4000*l.*, being the principal moneys due to them from the plaintiff under their securities, and all interest which might be then unpaid and which should have accrued due since the date of the deed in statement, and in the next place the said share or proceeds should be applied, so far as the same would extend, in payment of the principal and interest moneys which might be due to J. Mobberley, and the surplus, if any, should belong to and be paid to the bank for their own absolute use and benefit. And the parties of the first three parts covenanted with the bank to do every act and make all such appearances and

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answers and procure all such certificates and documents as would be necessary to enable the bank to effect an insurance upon the life of each of the said three parties; and the bank thereby covenanted with the first three parties to pay all duties to the Inland Revenue in respect of the shares and interests thereby assigned, and to hold the said three parties indemnified therefrom.

At the date of this deed of assignment there was owing to J. Mobberley the principal sum of 2000*l.* with two years' arrears of interest, and no interest had been paid on the 2000*l.* since. J. Mobberley died on October 14, 1907, and the mortgage debt with arrears of interest for ten years and more was now vested in one of his daughters, Beatrice Maria Mills, the wife of the plaintiff. She had called upon her husband to pay the debt under the covenant contained in the mortgage deed of March 14, 1899, and he now brought this action on July 13, 1910, claiming a declaration that he was entitled to be discharged and exonerated by the defendants from all liability in respect of this debt of 2000*l.* and interest, and that the defendants might be ordered to pay the debt to his wife. The plaintiff's mother, Harriet Mills, did not marry again and was still alive. The plaintiff's interest therefore remained a contingent reversionary one. The plaintiff alleged in his claim that the effect of the purchase by and assignment to the bank of the equity of redemption in his one eleventh share in the residuary estate of J. Mills, subject to the mortgage of March 14, 1899, was that the defendants became subject to an implied contract or obligation to the plaintiff to indemnify him against the mortgage of March 14, 1899, and the money thereby secured.

Jessel, K.C., and *V. Somers Browne*, for the plaintiff. There is a well-settled rule in equity that the purchaser of an equity of redemption is liable to pay off the money due upon the mortgages. A question of construction also arises under the documents, but it is submitted that the only way to free the accrued share of the plaintiff which is also mortgaged is by paying off the charge. Unless, therefore, there is an express provision in the deed assigning the equity of redemption negativing the implied liability,

the purchaser must pay what is due under the covenant in the mortgage. The principle is laid down by Lord Eldon in *Waring* v. *Ward*. (1) It is true that was not a case of a reversion, vested or contingent, and there appears to be no case reported of that precise description. In other cases the same principle is recognized, as in *Bridgman* v. *Daw* (2) and *In re Law Courts Chambers Co.* (3). A strong case in our favour is that of *Adair* v. *Carden* (4), where the principle is concisely stated in the head-note. The text-books which state the principle are also quoted in the judgment. The proposition is reasonable, as the price given for the equity of redemption is dependent upon this liability. The principle is extended in *Dodson* v. *Downey* (5) to the purchase of a share in a partnership, and is applicable to principal and surety: *Ascherson* v. *Tredegar Dry Dock and Wharf Co.* (6) It is submitted that the principle must be held to extend to a reversionary interest vested or contingent: *Tweddell* v. *Tweddell* (7); *Woods* v. *Huntingford*. (8) This general rule cannot be cut down to meet the exigencies of any particular property; it applies equally to all property. The terms of the deed of October 30, 1902, are not such as to negative the application of the rule and release the defendants from their obligation to make this payment.

P. O. Lawrence, K.C., and *Frederic Thompson*, for the defendants. As to the equitable rule which is relied upon, there is no implication of liability such as the plaintiff suggests, when the subject-matter of the sale is a contingent reversionary interest, or, in the alternative, unless and until the interest vests in possession. Further, there can be no implication of an unqualified personal liability on the purchaser where, as here, there is an express qualified indemnity expressed in the deed of assignment. By the terms of the deed of October 30, 1902, which was a family arrangement, the first mortgage is kept alive, to prevent the second mortgagee dealing with the property and effecting a merger. In this deed also there is an express contract to pay

(1) 5 Ves. 670; 7 Ves. 332.
(2) (1891) 40 W. R. 253.
(3) (1889) 61 L. T. 669.
(4) (1892) 29 L. R. Ir. 469.
(5) [1901] 2 Ch. 620.
(6) [1909] 2 Ch. 401.
(7) (1786) 2 Bro. C. C. 101, 152.
(8) (1796) 3 Ves. 128.

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in a certain order and out of certain property. No implication, therefore, is necessary, and it is in fact excluded by the terms of the deed: *Mathew* v. *Blackmore*. (1) Where there is a qualified covenant in a deed the larger covenant which the law would otherwise imply is excluded: *In re Railway and Electric Appliances Co.* (2) The terms of the deed are wholly inconsistent with a covenant to indemnify the vendor.

Jessel, K.C., in reply.

Cur. adv. vult.

March 31. EVE J., after stating the facts, continued:—The plaintiff's claim is based upon the proposition that in all cases in which the subject-matter of a sale is an equity of redemption, the purchaser, in the absence of an express contract to the contrary, must be regarded as covenanting with the vendor to indemnify him against the personal obligation to pay the money due upon the mortgages. Regard being had to the results which flow from the implication of such a covenant on the part of the purchaser, it is important to consider whether the proposition is of so general and unqualified a character as is contended for here. In particular, it must be borne in mind that, in all cases where there is an actual accrued debt upon a covenant to save harmless, a bill may be filed to relieve the covenantee from the debt whether he has been actually sued for it or not: see per Lord Redesdale, Mitford on Pleading, 5th ed. pp. 171, 172; *Wooldridge* v. *Norris* (3); *Ascherson* v. *Tredegar Dry Dock and Wharf Co.* (4); and at any time, therefore, after completion of the sale of the equity the vendor could call upon the purchaser, under his implied covenant, to discharge the mortgages.

The plaintiff relies on a passage in the judgment in *Waring* v. *Ward* (5) as establishing his proposition. Lord Eldon, after discussing the question of the right of the heir to be exonerated out of personal assets, refers to the position of a purchaser of an equity of redemption in these terms: "The party," that is the purchaser, "means at the time of the contract

(1) (1857) 1 H. & N. 762.
(2) (1888) 38 Ch. D. 597.
(3) (1868) L. R. 6 Eq. 410, 413.
(4) [1909] 2 Ch. 401.
(5) 7 Ves. 332, 336.

to buy the estate subject to that mortgage; in relation to which mortgage the personal contract was entered into; and that was not his. If he enters into no obligation with the party, from whom he purchases, neither by bond nor covenant of indemnity to save him harmless from the mortgage, yet this Court, if he receives possession, and has the profits, would, independent of contract, raise upon his conscience an obligation to indemnify the vendor against the personal obligation to pay the money due upon the vendor's transaction of mortgage; for, being become owner of the estate, he must be supposed to intend to indemnify the vendor against the mortgage."

Now, it is to be observed that Lord Eldon, who puts the obligation upon conscience and not upon implied contract, limits his statement to cases where the purchaser gets possession, and in every reported case in which the principle has been applied the element of possession has been present. Moreover he says nothing to warrant the proposition that the obligation in the absence of an express contract to the contrary must arise. All he says is that, in the ordinary case of the sale of an estate in possession subject to a mortgage, the purchaser, whether he covenants in terms to do so or not, must indemnify the vendor against his personal covenant to pay the mortgage debt, and to the proposition as stated, whether the obligation be treated as resting on conscience or on implied contract, neither the defendants nor any one else could be heard to take exception. But what the defendants do say is, first, that the principle has no application where the subject-matter of the sale is a contingent reversionary interest, or, alternatively, has no application unless and until the interest vests in possession; and, secondly, that the implication of an unqualified personal liability on the part of the purchaser is negatived in this and in all cases where there is an express qualified indemnity, or where the circumstances and nature of the transaction are otherwise of a nature to rebut such implication. In the present case they say that not only does the assignment of the equity contain an express and limited indemnity, but the circumstances in which it was executed, as appearing from the recitals and the terms of the deed itself, leave no room for doubting that neither of the parties ever

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contemplated the purchasers coming under such liability as is now sought to be imposed upon them.

I think the defendants are entitled to succeed on either of these two grounds. While I am not prepared, without fuller argument and further consideration, to hold that the rule which prima facie throws upon the purchaser of an equity of redemption the obligation of indemnifying the vendor under his personal covenant has no application where the subject-matter of the sale is a contingent reversion, I think it is in strict accord with Lord Eldon's statement of the law, and with the reasoning upon which it is founded, to hold—as I do—that if in such a case any obligation in respect of the vendor's personal covenant is imposed on the purchaser, such obligation must be conditional upon the interest vesting in possession, and that, until that event has happened, the person claiming the benefit of the implied covenant cannot sue.

This conclusion is, in itself, sufficient to dispose of the plaintiff's action, but if I am wrong in the view of the law which I have just expressed, I still think that the defendants have a complete answer to the plaintiff's claim. The transaction of October, 1902, to which the plaintiff and his partners and the defendants are all parties, must be looked at as a whole, and although it involved the acquisition by the defendants of the plaintiff's equity of redemption, it could not be accurately or fully described as a sale and purchase of an equity of redemption. It was something much more than that. It was a rather complicated scheme of arrangement under which the plaintiff was relieved of very serious liabilities, and received other substantial benefits, and the defendants became the assignees of (inter alia) his one eleventh contingent reversionary share subject to the mortgages thereon. In the deed giving effect to such an arrangement one would naturally expect to find all the terms of the arrangement clearly expressed, and this anticipation is strengthened and confirmed by a perusal of the deed of October 30, 1902. It is carefully and skilfully prepared, and upon the face of it would appear to be a document in which the parties have expressed all the terms of the bargain, leaving nothing uncertain or dependent on an implication of any kind. For example, such

matters as the right of the creditors to call upon the debtors to do any acts or to answer any inquiries necessary for the purpose of enabling assurances to be effected on their lives are made the subject of a special covenant; so also the obligation of the assignees to indemnify the assignors against succession and other duties, all elements which point to the intention of the parties to express the whole contract in the deed. And when one comes to examine in detail the provisions of the deed, it is somewhat difficult to appreciate why the bank's mortgages were to be kept alive as against all moneys owing by the plaintiff to J. Mobberley if, at the very moment of executing the deed, the bank were coming under the obligation to discharge these moneys whenever called upon by the plaintiff so to do. But, beyond all this, I think that the covenant by the bank to apply the excess proceeds of the plaintiff's share, if and when it falls into possession (after retaining thereout 4000*l.* for themselves), in the discharge of the Mobberley mortgage debt and the interest thereon, is an express and limited indemnity which—applying the maxim "Expressum facit cessare tacitum"—excludes the fuller indemnity which might otherwise be implied. I think, therefore, the plaintiff's action fails, and I dismiss it with costs.

Solicitors: *F. Venn & Co., for Bartley, Bird & Co., Liverpool; Field, Roscoe & Co., for Jobson & Marshall, Dudley.*

G. M.

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Feb. 20.
C. A.
March 29.

In re HYDE PARK PLACE CHARITY.

[1911 H. 2773.]

Practice—Charity—Scheme—Leave to intervene and attend Proceedings—Time of Intervention.

In 1762 land was bought for a burial ground for the inhabitants of the parish of St. George, Hanover Square. Building leases were granted of the unconsecrated part of the land, and, as they fell in, fresh leases were granted, so that the property was now worth over 2000*l.* a year. The Council of the city of Westminster brought an action against the rector and churchwardens of the parish for a declaration that the premises were not Church property, and that the power of the vestry of the parish to administer the income thereof had been transferred to the council by the London Government Act, 1899. The House of Lords decided that the land was Church property, and that the power to direct the application of the income did not pass to the council; but their Lordships expressly refrained from deciding for what purposes the income was applicable. The case is reported; *Westminster Corporation* v. *Rector and Churchwardens of St. George, Hanover Square* [1908] 2 Ch. 600, [1909] 1 Ch. 592, and [1910] A. C. 225.

The rector and churchwardens took out a summons for the establishlishment of a scheme for the administration of the trusts of the charity, to which the Attorney-General was the only respondent. The council applied by summons for liberty to intervene and attend the proceedings for settlement of a scheme:—

Held by Warrington J. and the Court of Appeal, that the application was premature and ought not to be acceded to.

Land bought with ecclesiastical funds was by a private Act (3 Geo. 3, c. l.) vested in the rector and churchwardens of St. George, Hanover Square, for ever for a burial ground for the inhabitants of the parish. Under the direction of the vestry, the rector and churchwardens granted building leases of the unconsecrated part of the land. In 1854 the burial ground was closed by an Order in Council. As the building leases fell in the buildings were pulled down; the rector and churchwardens, by direction of the vestry, granted fresh leases, and the property now produced a large income. On November 9, 1900, the vestry ceased to exist by virtue of the London Government Act, 1899, and, subject to the provisions of that Act, the powers of the vestry were vested in the Council of the city of Westminster.

By an Order in Council dated May 15, 1900, the burial ground premises were annexed to the borough of Paddington, but by the City of Westminster (St. George's, Hanover Square) Scheme, 1901, nothing in that Order was to affect any right or interest in those premises; and the scheme further provided that the powers and duties of the administrative vestry of St. George, Hanover Square, which related to the affairs of the Church should vest in the inhabitants of the ecclesiastical district for the time being attached to the church of St. George, Hanover Square, and that meetings of the inhabitants should be held for that purpose. This district covered a much smaller area than the old parish. The Council of the city of Westminster brought an action against the rector and churchwardens for a declaration that the premises were not Church property, and that the power of the vestry of St. George, Hanover Square, to administer the income of it for the benefit of the parish had been transferred to the council by the London Government Act, 1899. After considerable litigation it was decided by the House of Lords that the land in question was Church property, and that on the passing of the London Government Act, 1899 (which by s. 4 transferred the powers and duties of vestries to borough councils, but by s. 23 excepted any powers or duties relating to the affairs of the Church or any interest of a vestry in any Church property), the power and duty to direct the application of the proceeds of the leases did not pass to the Westminster Corporation as the borough council, but remained in the vestry under s. 24 of the Burial Act, 1857; but their Lordships expressly refrained from deciding whether the moneys must be exclusively applied for ecclesiastical purposes or not. The action was accordingly dismissed. The case is reported; *Westminster Corporation* v. *Rector and Churchwardens of St. George, Hanover Square*, [1908] 2 Ch. 600, [1909] 1 Ch. 592, and [1910] A. C. 225.

The rector and churchwardens took out an originating summons for the establishment of a scheme for the administration of the trusts of the charity with all proper inquiries and all necessary directions as to their powers and duties. The Attorney-General was the only respondent to this summons. The Council of the city of Westminster thereupon issued a

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summons asking that they might be at liberty to intervene in the action pending under the originating summons and to attend all proceedings in the action for the settlement of the scheme.

The summons was heard before Warrington J. on February 20, 1911.

Upjohn, K.C., and *J. M. Gover*, for the council.
Cave, K.C., and *Errington*, for the rector and churchwardens.
Sargant, for the Attorney-General.

WARRINGTON J. stated the facts, and continued:—In my opinion, upon the true construction of the scheme, the power of giving the directions referred to in the Burials Act is vested in the inhabitants of the ecclesiastical district of St. George, Hanover Square—that is a limited district and not the entire ecclesiastical parish. A question has been raised, and has deliberately been left undecided by the House of Lords, whether the purposes for which this charity is applicable are civil purposes, ecclesiastical purposes, or both; or, to put it generally, what are the purposes for which this charity is applicable. That is a question which will have to be decided when the scheme comes to be settled. Now the city council come and say "We desire to represent the contention that the application ought to be for civil purposes." And they say "this is the time at which the question ought to be contested and we are the persons by whom it ought to be contested." Now, first with regard to the period at which the application is made. At the present moment the question does not directly arise, nor will it arise on hearing the originating summons. The usual course pursued on an originating summons for the settlement of a scheme is, if the case is otherwise appropriate, to refer the matter to chambers for the settlement of a scheme. A scheme is then carried in by the trustees; the Attorney-General, with the assistance of such persons as he desires to hear on the matter, then criticizes the scheme, and an application is made for its confirmation; and, on that application, any person who desires can apply for liberty to attend and represent his views. As to the question at what particular stage of the proceedings it would be proper to allow some person

to attend and represent the views of those who contend that the charity is a civil charity I say nothing at all. But I do say that this at all events is not the proper time. I should, therefore, in any case not be prepared to make an order now. But I think I ought to deal with the question which has been raised whether the city council would be the proper persons to represent the view that this is a civil charity. I do not think they are. They are the local authority governing the city of Westminster, which includes a large number of parishes besides that of St. George, Hanover Square. It seems to me that, as such, the effect of the London Government Act of 1899, as interpreted by the decision of the House of Lords in this case, is to exclude altogether from the city council any jurisdiction or control with reference to this charity. It seems to me that the city council, as such, have no more right to attend in a matter of this kind than any other person who might be selected for that purpose. In expressing this view with regard to the position of the city council I desire expressly to say that I do not intend to prejudice in any way the question whether any person, and, if so, what person, or body of persons, ought to be heard on this question when the time arrives to decide it. A time will arrive, and no doubt, as Mr. Sargant, acting on behalf of the Attorney-General, said, it will be found desirable to have somebody other than the Attorney-General to represent this particular contention. But on the question of who that person is to be I desire to say nothing whatever, except that I do not think that the city council is that person or body. The application, in my opinion, fails, and I must dismiss it, as Byrne J. did in *In re Cloudesley's Charity* (1), with costs.

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The council appealed. The appeal was heard on March 29, 1911.

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Upjohn, K.C., and *J. M. Gover*, for the appellants. Somebody who represents the view that this charity is purely secular ought to attend the proceedings for settling this scheme, and the council are the best persons to be appointed for this purpose.

(1) Before Byrne J., February 28, 1899; not reported.

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The House of Lords have expressly left undecided the question whether the charity is for secular or ecclesiastical purposes or for both. It will be impossible for the Attorney-General to represent all these points of view. We do not ask for leave to attend all the proceedings, but to have an opportunity of arguing this particular question. It is a preliminary question which must be decided before the scheme can be settled, and it ought to be discussed before any other proceedings are taken. At all events it cannot be said that anybody has a better right than we have to be present. We do not say that any powers or duties or rights of property have passed to us, but that this is a parochial trust for the benefit of the inhabitants of the parish, and this point must be settled before anything else can be done: *In re Norwich Town Close Estate Charity.* (1) The proposed scheme is not under s. 23 of the London Government Act, 1899, but under the general charitable jurisdiction of the Court. The House of Lords have left open the question who are the cestuis que trust, and we say they are the inhabitants of the whole parish, not merely the inhabitants of the present district. This question affects the rights of the inhabitants of the whole of the old civil parish of St. George, Hanover Square. That parish is now within our area, and all the secular rights and duties have been transferred to us by s. 4 of the Act of 1899. We agree that the question of giving us leave to attend is one of discretion, not of right. Under ss. 10 and 11 we are the overseers of the present district of St. George and have charge of its financial work. No one else is likely to come forward to argue this point; and other borough councils have been allowed to take up such questions; for instance the Wandsworth Borough Council in *In re Weir Hospital.* (2) We should be satisfied if a special committee selected from the members of the council were allowed to attend.

Cave, K.C., and *Errington*, for the rector and churchwardens. By the decision of the House of Lords the property is Church property vested in us, and the power to direct the application of the rents is vested in the inhabitants of the present district. The action was brought for a declaration to the contrary of that

(1) (1888) 40 Ch. D. 298. (2) [1910] 2 Ch. 124.

decision and it was dismissed. We agree that this is an application under the general jurisdiction of the Court. We do not contend that this is a purely ecclesiastical charity; and our scheme will not be drawn on that footing. We do not say that the question whether it is ecclesiastical has been decided by the House of Lords, but we ask that the common practice should be followed, and that an order should be made referring it to chambers to settle a scheme. The trustees will then frame a draft scheme; the Attorney-General will consider it, and consult any one he pleases, and settle the scheme. Till that has been done nobody will know whether this question will arise. The scheme will have to be sanctioned by the Court, and that is the right time for the city council to make this application. Their present application is premature; they wish to oppose a contention which has not yet been put forward. No Court could make an order on the subject at present, and the scheme may prove to be satisfactory to everybody. Secondly, the learned judge was right in saying that the city council were not the right persons to represent the secular party, although his Lordship's remarks were only dicta. There is no precedent for saying that the borough council ought to represent the parish on charitable matters. The council are in no better position than any other council in any other district. Their district was created for local government purposes such as rates and sewers. They have no powers in separate parishes as to charities, though they may appoint members on some of the committees. There are eleven different parishes within their area. Certainly they are not in a better position than the London County Council. A decision that such a body was entitled to this power would be disastrous: *In re Cloudesley's Charity.* (1) An inhabitant of the present district may turn out to be the right person to appoint. The members of the council have been elected for altogether different purposes, and they represent many different parishes besides ours. The council cannot act in this matter through a committee, for the proceedings of all committees must come before the whole council. The members of the committee would probably be bound by election pledges to reduce the rates and so on. The council would be

(1) Before Byrne J February 28, 1899; not reported.

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acting outside their powers and their costs would be disallowed by the auditors. Sect. 8, sub-s. 2, of the London Government Act, 1899, refers to a committee already appointed for statutory purposes. They cannot spend the rates in this way. They have already put us to very great expense and ought not to be allowed to interfere again, and the House of Lords have held that they have nothing to do with it.

Sargant, for the Attorney-General. No one ought to have leave to attend the proceedings generally. But this is a vital preliminary question, and every one agrees that it is desirable that when the question arises somebody should be present to represent the secular view. There is no rule as to the moment in proceedings for the settlement of a scheme when such a question ought to be determined, but till this is determined it is impossible for a scheme to be prepared or settled. The scheme cannot be criticized till it is known for whose benefit it is drawn. The Attorney-General will have to take steps to get the point decided at once. Sect. 23, sub-s. 6, of the Act of 1899 is inconsistent with calling a meeting of the inhabitants of the parish to ascertain their wishes. The trustees have no power to declare who shall be the cestuis que trust or to alter the trusts. The appellants do not claim to appear as of right; that would be a claim which we should oppose; but it is difficult to name anybody else who could be appointed.

Upjohn, K.C., in reply.

COZENS-HARDY M.R. This appeal from a decision of Warrington J. has been argued very elaborately and raises some questions of local interest, and one of general importance in the administration of charities. Without going into antecedent history, which would involve the consideration of proceedings in three Courts, it has been now decided by the House of Lords that the rector and churchwardens are the body in whom the charity property, which is said to be producing 2000*l.* a year, is vested upon some charitable trusts. The rector and churchwardens applied to the Court by an originating summons making the Attorney-General a party, and the only party, and they asked that a scheme might be directed. Before any order

was made the Westminster Council applied for liberty to attend the proceedings. The learned judge refused to make any order, and upon that summons, either as it was originally framed or in a modified form, in my opinion, he was perfectly right in refusing the application. I think it is of the extremest importance that in these charity cases that which I believe has been the uniform practice should be maintained, namely, that when in a matter of this kind the trustees apply to the Court by originating summons for a scheme and make the Attorney-General a party, that is a properly constituted proceeding, and no application to be added as a party ought to be listened to before an order has been made for the scheme. That is really all that Warrington J. decided. He said in effect—and I think he was perfectly right—"this is not a preliminary point; the application is premature." It may hereafter be necessary or convenient—and I will say necessary—to determine whether the charity is purely an ecclesiastical charity or purely a secular charity or a mixed charity, but that does not arise now. Wait till the proper time comes, and then, if in the proceedings after the order for a scheme has been made it should seem desirable, either on the application by the Attorney-General, by such a summons as Mr. Sargant has suggested, or otherwise, to have an argument addressed to the point as to the nature of the charity—whether it is ecclesiastical, whether it is secular, or whether it is mixed—then the Court can, if it thinks fit, appoint somebody, not to attend the proceedings under the scheme, but to assist the Court by deciding this one particular point. The Court can then appoint somebody to argue that point and to give the Court all the assistance it can obtain. I should say no more upon this case but for one remark at the end of the learned judge's judgment. He has intimated that although at the proper time and on the proper application he may think fit and proper—and will think fit and proper—to direct somebody to argue on one side or the other this point, he does not think that in any point of view the Westminster Council would be proper persons to be appointed to conduct the argument and to represent the secular view. Now, in my opinion, it is altogether premature to consider that; I have no intention of expressing either assent to or dissent

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from that dictum—for, after all, it was a mere dictum—of Warrington J.; but, to avoid all misunderstanding and to avoid any difficulty which may hereafter arise when the matter comes before Warrington J. again, or before any other judge of first instance, I think it right that we should say that our dismissing the appeal is without prejudice to any question which may hereafter arise on any proper application made to the learned judge, and is without prejudice to any question whether the Westminster Council are or are not proper persons to be appointed to represent the secular interest. That point is left entirely open to be decided upon any future application.

FLETCHER MOULTON L.J. I agree.

BUCKLEY L.J. This is an application by the mayor, aldermen, and councillors of the city of Westminster for leave to intervene upon this originating summons and to attend all the proceedings in the action for the settlement of the scheme. The originating summons in question is one whose object is to obtain a scheme and determine the provisions which shall be introduced into it for the management of the charity. Warrington J. has refused the application, and that upon two grounds: the first ground is that this is not the proper time for the borough council to seek to attend upon the proceedings; the second is that, whether it be the proper time or not, they are not the proper parties. Upon the first of those two points I think the learned judge was right. The matter stands thus: the applicants are the trustees of the charity; they are going to bring in a scheme. It ought to be—and I think the Court will assume that the scheme they will bring in will be—a proper scheme. The application before the Court is made upon the assumption that it will bear a particular complexion which the applicants wish to contest. It seems to me that that is premature. When the scheme has been brought in—when it is known what the complexion of the scheme is—it may or may not be necessary for a person to be allowed to intervene for the purpose of arguing a particular contention. Upon that ground I think the appeal ought to be dismissed.

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With regard to the second ground, having refused the first application on the ground that it is premature, it would be pessimi exempli that I should prematurely determine a question which does not arise. It is not necessary at present to determine whether the borough council are or are not the proper persons to intervene, and I therefore express no opinion on the matter; but it is not to be supposed from this that I think that the learned judge may not properly do again what he did before. That matter is left entirely open, and nothing that is said in this Court will prejudice the judge in any way in determining, when the proper time does come, whether these parties are proper parties to attend or not.

Appeal dismissed.

Solicitors: *Allen & Son; Capron & Co.; Solicitor to the Treasury.*

H. C. R.

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1911
March 23, 24, 29.

In re BEHREND'S TRUST. SURMAN *v.* BIDDELL.

[1910 B. 3397.]

Bankruptcy—Undischarged Bankrupt — After-acquired Property — Chose in Action—Interest under Settlement—Fund in Hands of Trustees—Knowledge of Trustees—Notice—Intervention of Trustee in Bankruptcy—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 44, *sub-s.* 2; *s.* 50, *sub-s.* 5.

A settlement made on a second marriage by an undischarged bankrupt of interests acquired after his bankruptcy in trust funds settled before his bankruptcy and still in the hands of the settlement trustees is a transaction for value within the rule laid down in *Cohen* v. *Mitchell* (1890) 25 Q. B. D. 262, and, if the transaction is bona fide on the part of the second wife, is valid against the trustee in bankruptcy until he intervenes by giving formal notice to the trustees of the settlement or otherwise. The facts that the settlement trustees have actual knowledge of the bankruptcy and that the value given for the transaction is not such as will increase the bankrupt's estate do not prevent the application of the rule.

By a settlement dated July 21, 1884, made on the first marriage of Alfred Theodore Behrend, certain reversionary

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interests in personalty and certain other property to which he and his intended wife were respectively entitled (therein called the husband's trust fund and the wife's trust fund) were assigned to trustees upon trust as to the husband's trust fund for A. T. Behrend for his life and after his death, in the events which happened of his surviving his wife and there being no issue of the marriage, in trust for him absolutely; and as to the wife's trust fund in trust for her during her life and after her death, if there should be no child of the said marriage, in trust for such persons as she should by will appoint. The settlement also contained a power for the wife to appoint by will a life interest to her husband.

By a voluntary settlement dated November 28, 1894, Mrs. Behrend settled by assignment to the trustees of the first settlement the share and interest to which she had become entitled under a certain will upon trust, in the event of her having no child, for her sisters or sister or their children as she should by will appoint. This settlement also contained a power for Mrs. Behrend to appoint by will a life interest to her husband.

A. T. Behrend was adjudicated bankrupt on March 30, 1892, and had not obtained his discharge.

By her will, dated October 29, 1908, Mrs. Behrend appointed to her husband life interests in the wife's fund under the first settlement and in the funds subject to the trusts of the voluntary settlement of November 28, 1894, and, if there were no children of the marriage, an absolute interest in the said wife's trust fund. Subject to her husband's life estate she appointed the funds subject to the trusts of the voluntary settlement to her sister M. C. M. Pickthall and she gave the residue of her property to her husband and appointed him sole executor. She died on July 11, 1909, leaving her husband surviving. There was no issue of the first marriage.

By a settlement dated November 6, 1909, made in contemplation of the marriage then intended and shortly afterwards solemnized between the said A. T. Behrend and M. C. M. Pickthall, the said A. T. Behrend assigned the life interest and interest in reversion expectant on his own death to which he was entitled under the trusts of the first settlement in the "husband's fund"

and the similar interests in the wife's fund to which he was entitled under the said trusts and his first wife's will, upon trust for his second wife during their joint lives, then for himself for life, and then (subject to the usual trusts for the children of the marriage, if any) for such persons as his second wife should by will while covert or by deed or will while discovert appoint, and in default of appointment for her next of kin. And he assigned his life interest in all the funds subject to the trusts of the voluntary settlement of November 28, 1894, to the same trustees upon trust to pay the income to his second wife during her life and after her death to pay the income to him for his life.

The second wife and the trustees of the original settlements and of the settlement made on the second marriage were all aware of the bankruptcy at the date of the last-mentioned settlement, but the trustee in bankruptcy had not then given formal notice or taken any steps to recover the settled funds.

It was not disputed that the second marriage was bona fide or that the settlement executed thereon was executed by all parties in the belief that it was a proper settlement which the husband had power to make.

On January 20, 1910, the official receiver, who was Behrend's trustee in bankruptcy, sent a letter to the trustees of the first marriage settlement claiming to be entitled to (1.) the whole income and capital of the husband's fund from the bankruptcy; (2.) the capital of the wife's trust fund and the income since her death; (3.) the income since the wife's death of the property settled by the voluntary settlement of 1894. The trustees of the settlement made on the second marriage also claimed these funds.

This summons was taken out by the trustees of the first marriage settlement for the determination of the question whether they ought to transfer the whole of the trust funds to the trustees of the second marriage settlement or to transfer to the trustee in bankruptcy all or any part of the funds he claimed.

Pepys, for the trustees of the first settlement.

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Micklem, K.C., and *J. G. Wood*, for the official receiver. It is quite clear that the official receiver is entitled to all the interest to which the husband was entitled at the date of the bankruptcy, and that includes the whole capital and income of the husband's fund. The only question is as to property acquired afterwards. So far as this consisted of a chose in action outstanding at the date of the second marriage settlement the trustees of that settlement could not get a better title than the official receiver, for the original trustees had notice of the bankruptcy and had therefore become trustees for the official receiver.

In any case the settlement on the second marriage was not a bona fide dealing for value within the rule laid down in *Cohen* v. *Mitchell*. (1) Under the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 44, sub-s. 2, clause 1, the property divisible among the creditors includes all property acquired by the bankrupt before his discharge, and by s. 50, sub-s. 5, choses in action are to be deemed to have been assigned to the trustee. No one with notice can get a better title. In this case both the second wife and the trustees of the second marriage settlement had notice of the bankruptcy. They could not get a better title by giving notice to the trustees of the first marriage settlement, for those trustees already knew of the bankruptcy, and their knowledge puts them in the same position as formal notice: *Lloyd* v. *Banks*. (2) The trustee in bankruptcy can clearly perfect his title against the particular assignee by giving notice first: *Mercer* v. *Vans Colina* (3); *In re Beall*. (4) *Cohen* v. *Mitchell* (1) was decided on the ground laid down in *Herbert* v. *Sayer* (5), that the bankrupt, dealing bona fide for value with his after-acquired property, is an agent for the trustee in bankruptcy who gets the benefit of the money consideration, but he is not the trustee's agent to give away the property. The rule is intended to be confined to ordinary business dealings. It cannot apply where the value given is marriage or anything else from which the bankrupt's estate in the hands of the trustee gets no benefit: *In re Rogers*. (6)

(1) 25 Q. B. D. 262.
(2) (1868) L. R. 3 Ch. 488.
(3) [1900] 1 Q. B. 130, n.
(4) [1899] 1 Q. B. 688.
(5) (1844) 5 Q. B. 965, 981.
(6) (1891) 8 Morrell, 236, 241.

The rule in *Cohen* v. *Mitchell* (1) does not give the bankrupt any new power of conveying property and therefore it does not apply to real estate: *In re New Land Development Association and Gray.* (2) On the same reasoning it cannot enable the bankrupt to deal with choses in action in a way contrary to the general law dealing with choses in action. He cannot make a good title to a chose in action where another person has already acquired a good title thereto by giving notice as the bankrupt has done in this case: *In re Beall.* (3)

Hunt v. *Fripp* (4) was a very different case; there had been a bona fide assignment by the bankrupt to a third person before the trustees had any notice of the bankruptcy, and the question was whether the trustee in bankruptcy could afterwards intervene because the assigned interest was still in the hands of the trustees.

Hon. E. C. Macnaghten, K.C., and *Dighton Pollock*, for the trustees of the settlement on the second marriage. Two points have been made on behalf of the trustee in bankruptcy—(1.) that the doctrine of *Cohen* v. *Mitchell* (1) does not apply where the after-acquired property is a chose in action in the hands of trustees who have knowledge of the bankruptcy; (2.) that this settlement is not a conveyance for value within the meaning of the rule. In support of (1.) counsel cited three cases. *Lloyd* v. *Banks* (5) has no bearing on the case. Lloyd was entitled to the property in question when he took advantage of the Insolvent Act; there was no question of after-acquired property. In both the other cases, *Mercer* v. *Vans Colina* (6) and *In re Beall* (3), the trustee in bankruptcy had actually intervened before the assignment. It cannot matter whether the trustees in whom the property was vested knew of the bankruptcy or not; the question is whether the trustee in bankruptcy has intervened. The settlement was unquestionably bona fide, for the lady settled property of her own. It was not a transaction entered into for the sake of the settlement. *Hunt* v. *Fripp* (4) shews that there is no duty thrown on the person dealing with the bankrupt to

(1) 25 Q. B. D. 262.
(2) [1892] 2 Ch. 138.
(3) [1899] 1 Q. B. 688.
(4) [1898] 1 Ch. 675.
(5) L. R. 3 Ch. 488.
(6) [1900] 1 Q. B. 130, n.

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make inquiry of the trustee. *Hampton* v. *Lubbock* (1) is a clear authority in our favour.

SWINFEN EADY J. This is an originating summons issued by the trustees of two settlements, the first a marriage settlement dated July 21, 1884, and the second a post-nuptial settlement dated November 28, 1894. The object of the summons is to have it determined to whom, in the events that have happened, the trustees are to pay and make over the funds now subject to the trusts of those two settlements.

It appears that under the first settlement of 1884 the husband's fund was settled, and he took an interest for life with ultimate remainder in certain events to himself, and he is now, in the events that have happened, absolutely entitled to the fund thereby settled and described as "the husband's fund." On March 30, 1892, he was adjudicated bankrupt. His wife died on July 11, 1909, and by the joint operation of the two settlements to which I have referred, and the will of the wife, the husband became entitled to certain further interests. He then married a second time, and on November 6, 1909, a settlement was executed upon the second marriage, and the interests which the husband had acquired were conveyed to trustees and settled upon the trusts therein declared. At the same time the second wife made a disposition and settlement of certain property to which she was entitled. Under those circumstances it is not now disputed that "the husband's fund" under the settlement of 1884 passed to the trustee in bankruptcy; it is a life interest with which the absolute interest has coalesced, and the whole fund is some 317*l.* The husband was contingently entitled at the date of the bankruptcy to the interest in remainder, and by the subsequent events he became absolutely entitled to it, and the fund now belongs to the trustee in bankruptcy.

The contest between the parties turns upon the after-acquired property, the property to which a new title accrued after the bankruptcy, and, indeed, some sixteen years after the bankruptcy. The second wife was a sister of the first wife. In

(1) [1900] W. N. 18.

her affidavit she states that before her sister's death she lived on and off for fourteen years with her sister and her husband, and when she was dying her sister begged her, and she promised, that after her sister's death she would live on with and look after her husband. "Shortly after my sister's death," her affidavit continues, "the said Alfred Theodore Behrend," that is the husband, "asked me to marry him, and as I knew it was what my sister would have wished and I was very fond of him I agreed to do so. He then offered to make provision for me by settling on me the moneys which had come to him through my sister's death and I accepted it. At the time when he offered to make the settlement I knew that he had some seventeen years before been made a bankrupt and had not been discharged, but he told me that the settlement he offered was a proper and valid one and in accepting it I fully believed it was so." Then there is an affidavit by the husband saying substantially the same thing. There is also an affidavit by the solicitors who prepared the settlement in which they give the history of the transaction. They shew that they were consulted with a view to a settlement being made on the second marriage, they took the opinion of counsel, which is exhibited, and they acted in accordance with the opinion which counsel gave.

Under the circumstances of this case I have no difficulty in arriving at the conclusion that the settlement upon the second marriage was an honest and bona fide transaction; it is not at all a case, like some that have happened, where the marriage was only made with a view of supporting the settlement; it is nothing of that sort, and it has not even been suggested that it was; it was an honest transaction carried through in good faith; the settlement was of property to which the husband's title had accrued after his adjudication, and there was also brought into the settlement some property to which the wife was herself entitled. The claimants to the fund are, therefore, the trustee in bankruptcy, who says that the fund belongs to him, and the trustees of the settlement on the second marriage, the settlement of 1909, who claim that it was a valid disposition of the after-acquired property, and that the funds, other than "the husband's fund," are held by the trustees of the

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two prior settlements in trust for the persons entitled under the settlement of 1909.

The claim of the trustees under the settlement of 1909 is based upon the law as laid down in *Cohen* v. *Mitchell.* (1) In that case Lord Esher M.R. said: "I am therefore prepared to lay down a proposition which has been agreed upon by us all, and which has been written down by my brother Lopes. It is this—until the trustee intervenes, all transactions by a bankrupt after his bankruptcy with any person dealing with him bona fide and for value, in respect of his after-acquired property, whether with or without knowledge of the bankruptcy, are valid against the trustee." It will be seen, I think, from the wording of that proposition, that the stress of bona fides is laid entirely and solely on the person dealing with the bankrupt; and if he has dealt in good faith, the question of whether the bankrupt, as between himself and the creditors, is also dealing in good faith is immaterial. There is no question in this case, as I pointed out, that the lady was dealing in good faith and that the marriage settlement was executed in good faith, but it was contended that the rule laid down in *Cohen* v. *Mitchell* (2) is limited to personal chattels and the like, and does not extend to choses in action, but, in effect, *Cohen* v. *Mitchell* (2) was itself a case of a chose in action. There damages had been recovered in an action by the bankrupt for wrongful conversion, and Hyam Cohen, the assignee, claimed the money, and there was an interpleader issue to determine who were the persons entitled to it.

Again in the case of *In re New Land Development Association and Gray* (3) Chitty J. pointed out that choses in action were within the rule.

In *Hunt* v. *Fripp* (4), again, which was a case of a chose in action, Byrne J. said: "Can I draw any distinction in this case because the property in relation to which the dispute arises is money in the hands of trustees which has never been paid over to the debtor, but has been paid into Court by the trustee to

(1) 25 Q. B. D. 267.
(2) 25 Q. B. D. 262.
(3) [1892] 2 Ch. 138.
(4) [1898] 1 Ch. 675, 680.

abide a decision as to the rights of the parties? This is undoubtedly an important question; but I find no sufficient ground for so limiting the proposition laid down in *Cohen* v. *Mitchell.* (1) That proposition is laid down in general terms, and Chitty J. in the later case of *In re New Land Development Association and Gray* (2) speaks of choses in action and other personal estate belonging to the bankrupt, and goods and chattels, as being within the decision of *Cohen* v. *Mitchell.* (1) I do not, therefore, feel justified in drawing so refined a distinction as to say that because in the present case the money is outstanding, and has not got into the hands of the persons by whom the assignment was made, that constitutes a valid distinction." Choses in action are within the rule, and it is no objection to the application of the rule that the money in question is a chose in action.

But it is then said that the rule has no application in the present case because the trustees having control of the fund being aware of the bankruptcy had notice of the bankruptcy, and, therefore, the assignee could not obtain a good title because the trustees having already notice of the bankruptcy held the property in trust for the trustee in bankruptcy. If that were the case, it would really prevent the application of the rule to choses in action at all, because no person having notice of the bankruptcy could safely deal with a bankrupt in respect of such an interest. It is clear that the rule in *Cohen* v. *Mitchell* (1) extends to cases where the person dealing has notice of the bankruptcy. If the contention of the official receiver in this case were well founded, a person could never safely deal with a bankrupt in respect to choses in action without applying to the debtor and asking him whether he had notice of the bankruptcy. If his title is to depend on the debtor not having notice of the bankruptcy, since asking the debtor whether he had notice of the bankruptcy is giving him notice of it, the result would be to prevent the application of the rule at all. I think it was decided the opposite way in the case of *Hunt* v. *Fripp* (3), to which I have just referred; in fact it was the very point, because it was in consequence of the executors

(1) 25 Q. B. D. 262. (2) [1892] 2 Ch. 138.
(3) [1898] 1 Ch. 675.

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knowing of the insolvency that they refused to pay over the fund to the assignees when notice of the assignment was served upon them. It appears from the report of the case in the *Law Reports* (1) that when the plaintiffs, that is the assignees, applied to the executors of the bankrupt's father for payment of the legacy and share of residue, the executors, being aware of the insolvency, refused to make payment. In the report of the same case in the *Law Journal* (2) it is stated even more clearly. There it states that on July 31, 1895, notice of Emery's assignment to the plaintiffs was given to the executors of the will of the father, and they knowing of the insolvency refused to pay over the money to the plaintiffs; so that it really was the exact point determined in the case.

It was then urged on behalf of the official receiver that a dealing like the present, the execution of a marriage settlement, was not a dealing within the rule of *Cohen* v. *Mitchell* (3), that although bona fide and for value it was not for value within the meaning of the rule. It is very difficult indeed to see why not. It was a settlement upon the second marriage honestly entered into, and I am unable to see why the parties claiming under the settlement do not claim bona fide and for value. As I gather, the reason put was that there was no resulting pecuniary benefit to the bankrupt which would pass to his trustee, and, therefore, it was said not to be within the rule; but there is no such limitation of the rule in *Cohen* v. *Mitchell* (3) itself.

I was also referred to a case (only reported in the *Weekly Notes*) which is very much stronger than the present, the case of *Hampton* v. *Lubbock* (4) before a Divisional Court consisting of Channell and Bucknill JJ. There it was held within the rule that certain after-acquired furniture had passed to the trustees of the settlement, and that the trustees of it had a good title as against the trustee in bankruptcy because it had been brought upon the premises and permitted to be used with other furniture, and so brought within the language of a subsisting covenant.

On behalf of the official receiver reliance was placed upon

(1) [1898] 1 Ch. 676.
(2) 67 L. J. (Ch.) 377.
(3) 25 Q. B. D. 262.
(4) [1900] W. N. 18.

three authorities. One was *Lloyd* v. *Banks.* (1) That case seems to me to have no application to the present because there was no after-acquired property at all.

The other two cases were *Mercer* v. *Vans Colina* (2) and *In re Beall.* (3) In *Mercer* v. *Vans Colina* (2) the trustee had intervened and claimed the fund both from Renton, who was the debtor, and the bankrupt, and had obtained a stop order on the fund without any notice or knowledge of Vans Colina's assignment, and the debtor Renton had also no notice or knowledge of it.

Again in *In re Beall* (3) the trustee had intervened and claimed the fund before he knew of the assignment to Grimwade, and before Grimwade had given notice of the assignment or claimed the fund in any way. In those cases there was the active intervention of the trustee before that of the assignee. In the present case it is quite different. Here there was no claim by the trustee in bankruptcy, before the post-nuptial settlement and notice of it to the trustees of the fund. The trustees of the fund were aware of the bankruptcy; they say so, and they had notice of the second settlement immediately it was executed. They were the solicitors acting in the preparation of the settlement. The two cases to which I have just referred are wholly distinguishable from the present on these grounds.

The result is that in my opinion the trustees of the post-nuptial settlement are entitled to the funds except "the husband's fund" under the first settlement, and that passes to the trustee in bankruptcy.

Solicitors: *Surman & Co.; Tarry, Sherlock & King; Lumley & Lumley.*

(1) L. R. 3 Ch. 488. (2) [1900] 1 Q. B. 130, n.
(3) [1899] 1 Q. B. 688.

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[0099 of 1910.]

Building Society—Advanced Member—Mortgage to Society—Rules of Society—Default by Mortgagor—Mortgagee in Possession—Trust to apply Rents in payment of Mortgage Debt—Surplus Rents—Statutory Accounts—Acknowledgment of Mortgagor's Title—Building Societies Act, 1874 (37 & 38 *Vict. c.* 42), *s.* 40—*Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 7.

A member of a building society mortgaged leaseholds to the society to secure an advance of 400*l.* on her shares repayable with interest by monthly instalments extending over ten years. The rules of the society provided that when the claims of the society upon any mortgaged property had been satisfied the statutory receipt should be indorsed upon the mortgage at the expense of the mortgagor. The deed conveyed the property to the society upon trust to permit the mortgagor to receive the rents until default in payment of any instalment and, upon default, to enter into possession of the rents and to apply the same in payment of all sums due from the mortgagor and to pay the balance (if any) to the mortgagor: the deed also contained a trust for sale.

In 1887 the mortgagor made default and the society went into possession and managed the property, treating it in their books as a mortgage transaction, and by 1902 all sums payable under the deed were satisfied. After 1902 the society entered the rents to a "suspense account" in their ledger until 1910, when the society was ordered to be wound up: the same year the lease of the property expired. In the winding-up the mortgagor claimed the surplus rents standing to the credit of the suspense account on the ground that the society were trustees thereof for her and that the Statute of Limitations did not apply:—

Held, following *In re Alison* (1879) 11 Ch. D. 284, that the deed though in form a trust was in substance a mortgage, that the Statute of Limitations commenced to run when the society took possession in 1887, and therefore that the claim of the mortgagor was barred.

Held, also, that the annual statutory accounts which the society published pursuant to s. 40 of the Building Societies Act, 1874, and in which the leaseholds were included in the properties of which the society were in possession as mortgagees, were not acknowledgments of the mortgagor's title within s. 7 of the Real Property Limitation Act, 1874, so as to preclude the operation of that section.

Wilson v. *Walton and Kirkdale Permanent Building Society* (1903) 19 Times L. R. 408, followed on this point.

ADJOURNED SUMMONS.

The above-named society was incorporated in 1883 under the

Building Societies Act, 1874, with the object to raise by the subscriptions of its members a fund for the purpose of making advances to its members upon freehold, copyhold, or leasehold estates by way of mortgage. Its rules provided (rule 16) that the funds of the society were to be employed by the board in making advances to members upon mortgage of their estates in such manner and to such an amount as the board might think expedient, and that each member on receiving an advance should give security to the satisfaction of the board, and should repay the amount with such premiums and interest by monthly or other instalments as the board might direct; (rule 17) that upon the board accepting a security they should allot to the member proposing the same loan shares to the amount agreed to be advanced, which should be paid to him upon his completing such security as the solicitor might advise; (rule 18) that when the claims of the society upon any property mortgaged had been satisfied, the board should at the expense of the mortgagor indorse a receipt upon the mortgage in the statutory form; and (rule 19) that any member desirous of redeeming the securities held by the society should be at liberty to do so upon payment of the amount of the advance outstanding and of all sums due from him for subscriptions, fines, and charges, together with an amount equal to three months' interest at the rate of 5 per cent. per annum upon the principal due at the date of redemption.

In 1884 a Miss Gatfield, a member of the society, having purchased four leasehold houses in Halpin Place, Walworth, obtained a loan of 400*l.* from the society on mortgage of the property. The transaction was arranged for her by a Mr. Hefford, a personal friend, who was then a director of the society. The mortgage was dated May 21, 1884, and made between Miss Gatfield (as mortgagor) of the one part and the society of the other part, and thereby, after reciting the head lease and the assignment thereof to the mortgagor and that the mortgagor was the owner of eight shares in the society "and is by the rules of the said society entitled, on her executing the mortgage hereinafter contained, to an advance of 400*l.* in respect of the said shares to be repaid in ten years by equal

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monthly payments of 4*l.* 8*s.* 8*d.* each, such monthly payments to include interest and premiums," the mortgagor as beneficial owner demised to the society the leaseholds for the unexpired residue of the term granted by the lease less the two last days thereof upon trust, so long as the mortgagor should pay the several subscriptions, premiums, redemption money, interest, fines and other moneys and observe and perform the rules and articles of the society in respect of the advance and her said shares, to permit the mortgagor to hold the demised premises and to receive the rents and profits thereof for her own benefit, and when the mortgagor should have fully paid all such subscriptions, &c., and should have observed and performed the said rules and articles of the society as aforesaid, " at the request and cost of the mortgagor to indorse upon these presents a receipt for all moneys hereby secured in the form prescribed by and according to the provisions of the Building Societies Act, 1874, to the intent that these presents may be vacated and the premises comprised herein may vest in the person for the time being entitled to the equity of redemption " ; but if the mortgagor should at any time thereafter neglect or refuse for three calendar months to observe and perform any of the rules or articles of the society or to pay the subscriptions, &c., " then upon trust at any time thereafter for the society, if and when they in their absolute discretion shall think fit, without the concurrence and notwithstanding the dissent of the mortgagor to enter upon and receive the rents and profits of the said premises . . . . and out of such rents and profits first to retain and pay all costs and charges of and relating to the preparation and execution of these presents (if not then already paid) and all the costs and charges which they may incur in the execution of the trusts of these presents or in recovering and receiving the said rents and profits, and then all sums due and owing from the mortgagor to the said society in respect of the said advance and in respect of her said shares by virtue of these presents or according to the rules of the said society, and to pay the surplus (if any) to the mortgagor." Then followed a trust for sale at any time after such default, &c., as aforesaid, whether the society should have entered into possession of the

rents and profits or not, with usual ancillary clauses, including a trust of the balance of the proceeds of sale (if any) for the mortgagor. The deed contained no proviso that on default in payment of any instalment the whole balance of the loan should immediately become due and payable.

Miss Gatfield kept up the payments of the instalments under her mortgage until about June, 1887, when she married a Mr. Mertling and went to New Zealand. Shortly before she went abroad she informed the society that she could no longer keep up her instalments, and about August, 1887, the society went into possession of the rents and profits of the leaseholds and thereafter managed the same. In 1888 Mr. Hefford became the secretary of the society and held that office until March, 1910, when an order was made for the winding-up of the society and a liquidator was appointed. Later the same year the lease of the four houses in Halpin Terrace expired and the liquidator surrendered the property to the lessor.

Mr. Hefford, whilst secretary, kept the books of the society and prepared its annual statements of account and balance-sheets for the auditor, and it appeared that in the ledger the account of "Miss Gatfield" was kept as a mortgage transaction, and that by the end of the year 1902 all sums due under the deed had been satisfied by the rents. After that year the rents were carried to a "suspense account" in the ledger, and later the words "For dilapidations Halpin Place" were added, but no claim for dilapidations was made by the lessor. It also appeared that in the annual statutory statement of account of the society down to the year 1909, which were signed by the auditor and by the chairman of the society and countersigned by Hefford as secretary, and were sent to the Registrar of Friendly Societies pursuant to s. 40 of the Building Societies Act, 1874 (1), the

(1) The Building Societies Act, 1874, s. 40, enacts: "The secretary or other officer of every society under this Act shall, once in every year at least, prepare an account of all the receipts and expenditure of the society since the preceding statement, and a general statement of its funds and effects, liabilities and assets, showing the amounts due to the holders of the various classes of shares respectively, to depositors and creditors for loans, and also the balance due or outstanding on their mortgage securities (not including prospective interest), and the amount

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leaseholds at Halpin Place were until the year 1902 included in the "properties of which the society are in possession as mortgagees." After 1902 and until the winding-up the rents standing to the credit of the "suspense account" were entered in the annual balance-sheets as a liability of the society.

After 1887 no communication was received from Mrs. Mertling until the winding-up of the society, when Mr. Hefford, having obtained a power of attorney from her, lodged a proof in the winding-up on her behalf for the surplus rents on the ground that the society held them in trust for her. The liquidator rejected the proof on the ground that no moneys were due to Mrs. Mertling; alternatively, he set up the Statute of Limitations. Mr. Hefford then issued a summons asking that the claim might be allowed.

There was a conflict of evidence whether or not Mr. Hefford after 1887 continued to act as agent for Mrs. Mertling, and the Court found that he did not represent her in any way until he obtained her power of attorney in 1910.

F. Daldy, for the summons. The position of an advanced member of a building society is not quite the same as that of an ordinary mortgagor, and the contractual relation between them is governed by the rules of the society as well as by the mortgage: Wurtzburg on Building Societies, 4th ed. p. 197. Here, having regard to the rules of the society, the terms of repayment, and the special form of the proviso for redemption, the Statute of Limitations did not operate and time did not commence to run until after the expiration of the ten years, i.e., until after 1894, and the mere possession of the society

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invested in the funds or other securities; and every such account and statement shall be attested by the auditors, to whom the mortgage deeds and other securities belonging to the society shall be produced, and such account and statement shall be countersigned by the secretary or other officer; and every member, depositor, and creditor for loans shall be entitled to receive from the society a copy of such account and statement, and a copy thereof shall be sent to the registrar within fourteen days after the annual or other general meeting at which it is presented, and another copy thereof shall be suspended in a conspicuous place in every office of the society under this Act."

without acknowledgment of the mortgagor's title during the ten years was no bar to redemption: *Wilson* v. *Walton and Kirkdale Permanent Building Society* (1); *Alderson* v. *White* (2); *Brown* v. *Cole* (3); Fisher on Mortgages, 6th ed. s. 1404. If that is so, then before the expiration of twelve years from 1894 the mortgage was satisfied and the mortgagor was entitled under rule 18 to have the statutory receipt indorsed on the mortgage, and the society became express trustees of the surplus rents for her in the same way as there is an express trust of surplus sale moneys for a mortgagor under a power of sale: *Locking* v. *Parker*. (4) There must be adverse possession: Fisher on Mortgages, 6th ed. ss. 1407, 1408. Here there was no adverse possession. The property was never treated as an asset of the society in their books, but always as the property of Miss Gatfield, and on the evidence the society must be taken to have acted as her agents, and the principle of *Ward* v. *Carttar* (5) applies. In the next place, there has been sufficient acknowledgment to take the case out of the statute in the published annual statutory accounts of the society and by the society carrying the surplus rents to a "suspense account" in their ledger as a liability of the society.

A. Grant, K.C., and *Lavington*, for the liquidator. As to the first point, the cases shew that although a security may be taken in the form of a trust it is none the less a mortgage: *In re Alison* (6); *Locking* v. *Parker* (4); *Kirkwood* v. *Thompson* (7); and the rights under a building society mortgage are the same as under an ordinary mortgage: *Provident Permanent Building Society* v. *Greenhill*. (8) Secondly, the published statutory accounts of the society, although they contain admissions that the society were in possession as mortgagees, were not acknowledgments of the mortgagor's title within s. 7 of the Real Property Limitation Act, 1874: *Wilson* v. *Walton and Kirkdale Permanent Building Society* (1). The section requires that the acknowledgment shall be given in writing to the mortgagor, or to some person claiming

(1) 19 Times L. R. 408.
(2) (1858) 2 De G. & J. 97, 109.
(3) (1845) 14 Sim. 427.
(4) (1872) L. R. 8 Ch. 30, 40.
(5) (1865) L. R. 1 Eq. 29.
(6) 11 Ch. D. 284.
(7) (1865) 2 H. & M. 392.
(8) (1878) 9 Ch. D. 122, 124.

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through him. Here it is admitted that no acknowledgment was ever given to the mortgagor, unless the published accounts can be deemed to be an acknowledgment; but if the published accounts of a building society constitute an acknowledgment sufficient to take the case out of the statute, it follows that no building society can ever acquire a statutory title by possession.

F. Daldy in reply.

Cur. adv. vult.

March 2. NEVILLE J. In 1884 Miss Gatfield, afterwards Mrs. Mertling, took shares in the building society for the purpose of obtaining an advance in respect of certain houses in Halpin Street, Walworth, which she had bought on the advice and with the assistance of Mr. Hefford, a personal friend. Mr. Hefford was at the time a director and subsequently the secretary of the building society and managed the transaction for her. The rents proved at first insufficient to meet her subscriptions, and Miss Gatfield for some time made up the difference, but in or about the year 1887 the society entered into receipt of the rents and profits in pursuance of a power contained in their mortgage. The loan was made to Miss Gatfield as the owner of eight shares in the society. The amount advanced was 400*l.* repayable in ten years by equal monthly payments of 4*l.* 8*s.* 8*d.* each to include interest and premiums. The mortgage was dated May 21, 1884, and contained a clause entitling the mortgagees on failure of the mortgagor to keep up the subscriptions and payments due under the mortgage to enter upon and receive the rents and profits. This clause is in the form of a trust, and the trust is out of such rents and profits to retain and pay, first, costs, charges, and expenses, then all sums due and owing from the mortgagor to the society in respect of the said advances, and to pay the surplus, if any, to the mortgagor. Mrs. Mertling shortly after the society had taken possession left this country for New Zealand, leaving no instructions with regard to the mortgaged property behind her, and apparently thought no more about the matter until Mr. Hefford, after the winding-up of the society in March, 1910, communicated with her and obtained her authority to recover anything which might be recoverable against the society.

The society remained in receipt of the rents and profits, the ten years expired in 1894, and the whole of the repayments had been satisfied out of the rents by 1902. The society had throughout this time adhered to the terms of the trust nominally imposed upon them, carrying the rents to the credit of Mrs. Mertling's account in the ledger until her indebtedness was satisfied. They then inserted a new heading in the ledger account, namely, "Suspense account," and subsequently, probably a year or so afterwards, added a reference to "dilapidations." They were under the impression for some reason which I fail to follow that upon the expiration of Mrs. Mertling's lease, which would expire in 1910, under which the sub-lease to the society by way of mortgage was granted, they might become subject to a claim for dilapidations. They appear to have parted with their interest in the houses, whatever it may have been, to the head landlord some time previous to the expiration of the lease. The only question arising on the present application regards the balance of the rents from the property in the hands of the liquidator accrued since the repayments under the mortgage were satisfied. The point is whether the claim is barred by s. 7 of the Real Property Limitation Act, 1874. I am satisfied that the society gave no acknowledgment to Hefford as the agent of the mortgagor and did not deal with him as her agent at all after she had left the country. He was not her agent and I do not think he purported to act as her agent after that time.

The next point to be dealt with is whether the accounts stated in accordance with s. 40 of the Building Societies Act, 1874, amounted to an acknowledgment within the meaning of s. 7 of the Limitation Act. They were signed by the auditor and chairman and countersigned by the secretary, and they contained acknowledgments that the society were in possession as mortgagees. Copies had to be and were sent to the Registrar of Friendly Societies, and a copy should have been suspended in a conspicuous place in each office of the society. Every member was entitled to a copy. Did this publication of the acknowledgment amount to the giving of the acknowledgment to the mortgagor within the meaning of s. 7 in the Limitation Act? The mortgagor certainly never received it and I think it did

NEVILLE J. 1911 METROPOLIS AND COUNTIES PERMANENT INVESTMENT BUILDING SOCIETY, *In re.* GATFIELD'S CASE.

not. This point is, I think, virtually decided by the decision of Walton J. in *Wilson* v. *Walton and Kirkdale Permanent Building Society*. (1)

The question then arises whether any effect can be given to the trust declared by the mortgage deed, which on the face of it is clear enough, or whether notwithstanding the terms employed the rents were received by the society as mortgagee only so as to bring the statute into operation. I think the decision in *In re Alison* (2) is conclusive upon the point if the statute commenced to run in 1887, when the society first took possession, inasmuch as the surplus of rents did not arise until after the expiration of the twelve years limited by the statute. In that case the houses became the absolute property of the society in 1899, and the rents after that date were received on their own account and Mrs. Mertling can have no claim upon them. If, however, a title was not acquired until 1906, twelve years from the expiration of the time for which the loan was made, a trust of the surplus rents had arisen before the estate was barred. It may be that under these circumstances the trust would be operative. The debt for which the property was security having been satisfied, the rule that the mortgagee cannot make himself a trustee for the mortgagor may not apply any more than it applies to the surplus of sale moneys in the hands of a mortgagee in the case of a sale before a statutory title had been acquired: see *In re Alison*. (2) If this were so, s. 25 of the 3 & 4 Will. 4, c. 27, would apply. It is necessary, therefore, to consider from what time the statute commenced to run. The rule is stated in Fisher on Mortgages, 6th ed. s. 1404, as follows: "Time will not run in the case of a common mortgage until the day of redemption has arrived; for the mortgagor cannot redeem before that day: *Brown* v. *Cole*." (3) This proposition must, I think, be accepted with caution. The decision in *Brown* v. *Cole* (3) was to the effect that a mortgagor is not entitled to redeem before the expiration of the time limited for payment of the mortgage debt. The deduction that the statute will only commence to run from the same date appears to be based upon the assumption that

(1) 19 Times L. R. 408. (2) 11 Ch. D. 284.
(3) 14 Sim. 427.

the statutory bar can only commence to run from the time when the right first arose, but s. 7 of the Act of 1874 provides for the commencement from the time when the mortgagee obtained possession. In the present case part of the mortgage debt was repayable at the time the society took possession, and I do not see any escape from the plain words used in s. 7. If time, as I think, began to run from 1887, the society acquired a statutory title before the mortgage debt had been satisfied, and, inasmuch as no action could be brought to recover the land, no claim to the rents since accrued can, in my opinion, be maintained. This view as to the time from which the statute commences to run appears to be in conflict with the opinion expressed by Walton J. in the case of *Wilson* v. *Walton and Kirkdale Permanent Building Society*. (1) The point, however, had not to be decided in the case before him, and he gives no reasons for his opinion. I think, therefore, that I must arrive at a conclusion independently of that case. In my opinion, therefore, the liquidator was right, and this application must be dismissed with costs.

Solicitors: *J. E. Anthony; Fraser & Son.*

(1) 19 Times L. R. 408.

H. L. F.

PARKER J.
1911
March 2, 3.

In re WROTTESLEY'S SETTLEMENT.
WROTTESLEY *v.* FOWLER.

[1911 W. 231.]

Settlement—Portions—Younger Children—Eldest Son—"Heir male or heir male apparent"—Younger Son afterwards becoming Eldest Son—Exclusion.

By a marriage settlement made in 1861 real estate was limited to uses under which A. became tenant for life with remainder to his first and other sons in strict settlement. On the same day was executed a settlement of personalty by which it was declared that after the death of A. and his intended wife the trustees should stand possessed of the trust funds in trust for the children of the marriage "other than an eldest or only son or other son who before attaining the age of twenty-one years shall be or become the heir male or heir male apparent of" A. as A. and his wife should appoint. Each of the settlements was made in consideration of the marriage, but neither of them contained any express reference to the other. A. had five children—a son W., who attained twenty-one, disentailed and resettled the estate, and died a bachelor in 1899; a son V., who attained twenty-one, became eldest son on the death of W., and took a life interest under the resettlement; B., who died an infant; and two others who were still living. A. died in 1910, and V. thereupon became entitled to the settled real estate for his life:—

Held, that the two settlements must be read together, but that V. was not excluded from a share in the settled personalty.

By a settlement executed on July 17, 1861, on the marriage of the Hon. Arthur Wrottesley (afterwards the third Baron Wrottesley) with the Hon. Augusta Elizabeth Denison, the Wrottesley estates were limited to uses under which the Hon. Arthur Wrottesley became tenant for life with remainder to his first and other sons in tail male in strict settlement. This settlement contained amongst other provisions a power for tenants for life to charge the settled estates with the payment of portions as therein mentioned for the children of the person for the time being exercising the said power other than a son who before attaining the age of twenty-one years should be or become the eldest or only son or heir male or heir male apparent of the person for the time being exercising the power.

On the same day a settlement of personalty was executed by which it was declared that after the death of the survivor of the

Hon. Arthur Wrottesley and the Hon. Augusta Elizabeth Denison the trustees should stand possessed of the trust funds and the income thereof "In trust for the child or for all or such one or more exclusively of the others or other of the children of the said intended marriage (other than an eldest or only son or other son who before attaining the age of twenty-one years shall be or become the heir male or heir male apparent of the said Arthur Wrottesley) at such age or time or respective ages or times if more than one in such shares and with such future and executory or other trusts for the benefit of the said children or some or one of them with such provisions for their respective maintenance education or advancement at the discretion of the said trustees or trustee for the time being or of any other person or persons and upon such conditions with such restrictions and in such manner as the said Arthur Wrottesley and Augusta Elizabeth Denison shall by any deed or deeds or writing or writings sealed and delivered with or without power of revocation and new appointment jointly appoint And in default of such appointment and so far as no such appointment shall extend then as the survivor of them shall in like manner or by will or codicil appoint And in default of any such appointment and so far as no such appointment shall extend In trust for all the children or any the child of the said intended marriage other than as aforesaid who being sons or a son shall attain the age of twenty-one years or being daughters or a daughter shall attain that age or marry under that age and if more than one in equal shares Provided always that no appointment under either of the powers of appointment hereinbefore contained shall be effectual to confer a vested interest on any child of the said intended marriage who being a son shall die under the age of twenty-one years or being a daughter shall die under that age and unmarried." This provision was followed by a hotchpot clause.

Each of these settlements was made in consideration of the intended marriage, but neither of them contained any express reference to the other.

There were five children only of the marriage, namely, William, who was born on May 17, 1863, and died on October 7, 1899; Bertram, who was born in 1864 and died in 1875; Evelyn

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Henrietta, who was born in 1866 and was married in June, 1910, to the Hon. H. E. Fowler; Victor Alexander, who was born on September 18, 1873; and Walter Bennet, who was born on September 28, 1877. Arthur succeeded to the title and estates in 1867 and died on December 28, 1910, whereupon Victor Alexander became the fourth Lord Wrottesley.

By an indenture of May 8, 1885, the entail created by the settlement of 1861 was barred by William, who had then attained his majority, and by a deed of May 9, 1885, the estates with certain exceptions were resettled subject to the life estate of Arthur, Lord Wrottesley, and to rent-charges in favour of William, to the use of William for life, with remainder to the use of his first and other sons in tail male with remainder to the use of Victor Alexander for life with remainders over.

Augusta Elizabeth, Lady Wrottesley, died on January 20, 1887. William died in 1899 a bachelor and intestate, and his father took out letters of administration to his estate. On the marriage of Evelyn Henrietta in 1910 a third part of the trust funds subject to the settlement of personalty was appointed to her by Arthur, Lord Wrottesley. On the death of Arthur, Lord Wrottesley, a question arose whether Victor Alexander, the present Lord Wrottesley, who became heir male of Arthur, Lord Wrottesley, on the death of William, was excluded from a share of the funds comprised in the settlement of personalty of July 17. 1861, or whether they were divisible in thirds between him, Mrs. Fowler, and Walter Bennet Wrottesley, and this summons was taken out to decide the point.

C. Gurdon, for the trustees.

Romer, K.C., and *F. Oswald Langley*, for Mrs. Fowler and Walter Bennet Wrottesley. The fund is divisible in moieties between the two younger children, and the present Lord Wrottesley is not entitled to share in it. The two settlements must be read as one and the settlement of personalty treated as creating a portions fund. Thus the ordinary rule in settlements of real estate as to the person who is the eldest son applies to this clause and Lord Wrottesley is excluded from sharing in the portions fund, because he is in fact in the position of eldest son

and in possession of the real estate, although not under the limitations of the settlement. It is settled that the rule of construction is the same as to realty and personalty and that a younger son who succeeds to the bulk of the father's estate is an "eldest son" within such a clause as this and is excluded from a share in the portions fund. "Eldest son" does not mean "firstborn son," but the son who takes the family estate: *In re Bayley's Settlement.* (1) Therefore the present peer is excluded, and the fact that he took the estate under the resettlement of 1885, not under the settlement of 1861, is immaterial: Norton on Deeds, pp. 430—441. It is also necessary to exclude William Wrottesley, who attained twenty-one and disentailed and resettled the estate. He is within the clause, for he became heir male of his father, Arthur, Lord Wrottesley, and cannot be treated as a younger son. The time for ascertaining who fills the character of eldest son is the period fixed by the settlement for the distribution of the fund, that is the death of the tenant for life: *Collingwood* v. *Stanhope.* (2)

[PARKER J. Is there any reported case in which two persons have been excluded?]

There is no reason why by these words more than one should not be excluded. Under the present form given in Davidson's Precedents in Conveyancing, 3rd ed. vol. iii., pt. 2, p. 988, and Key and Elphinstone's Precedents in Conveyancing, 9th ed. vol. ii. p. 673, the child entitled to the first estate in tail is excluded. In several cases it has been contemplated that two persons might be excluded, e.g., *Peacocke* v. *Pares* (3); *In re Stawell's Trusts* (4); and in *Gray* v. *Earl of Limerick* (5) it was actually done. In *In re Fitzgerald's Settled Estates* (6) it was held that only one eldest son was to be excluded, but that was on account of the peculiar language of the clause. The rule is stated in *Macoubrey* v. *Jones.* (7)

Martelli, K.C., and *H. L. Manby*, for the present peer. Lord Wrottesley is not the eldest son within the meaning of the

(1) (1871) L. R. 6 Ch. 590.
(2) (1869) L. R. 4 H. L. 43.
(3) (1838) 2 Keen, 689.
(4) [1909] 1 Ch. 534; [1909] 2 Ch. 239.
(5) (1848) 2 De G. & Sm. 370.
(6) [1891] 3 Ch. 394.
(7) (1856) 2 K. & J. 684.

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clause and he is entitled to share in the portions fund. He takes a life estate only and takes that under the resettlement. There is no connection between the two settlements of July 17, 1861, and the words "heir apparent" are used to negative that suggestion. The history of these clauses is given in Davidson's Precedents in Conveyancing, 3rd ed. vol. iii., pt. 1, p. 415, and Vaizey on Settlements, vol. ii. p. 1107. "Eldest son" in this settlement means "firstborn son." The clause was framed to meet the very events which have happened, and the authorities do not overrule it: *Adams* v. *Beck* (1); *Windham* v. *Graham.* (2) A third part of the fund vested in Lord Wrottesley, and it has not been divested by his succeeding to the title and estates. All the authorities are given in Norton on Deeds, pp. 430—441. There is no reported case in which two persons have been excluded from a share in a portions fund on the ground that they were both eldest sons.

Romer, K.C., in reply.

PARKER J. stated the facts, and proceeded. The question is whether, in the events that have happened, the present Lord Wrottesley is excluded from sharing in that fund. He is not the eldest or only child in the ordinary sense of the word, nor did he under the age of twenty-one become the heir male or heir male apparent of his father, so that prima facie he is not within the words. But it is said that I must give the words of this clause, especially the words "eldest son," a different interpretation because of the following facts. It appears that by another settlement, also made upon the occasion of this marriage and dated the same July 17, 1861, certain real estate to which the late Lord Wrottesley was entitled, subject to the life interest of his father, was settled to uses and subject to limitations under which, after the death of the late Lord Wrottesley and his father, there were limitations to the first and other sons of the late Lord Wrottesley severally and successively in tail male, and it is said that having regard to that fact I must apply, in construing the personal estate settlement of even date, the rules with regard to the interpretation of such words as "younger children" and "eldest

(1) (1858) 25 Beav. 648. (2) (1826) 1 Russ. 331.

son" which would apply in a real estate settlement where the bulk of the property was limited to sons successively in tail and there is a term for the purpose of raising portions for younger children. I am not prepared to say that I ought not, in construing this settlement, to give effect to those principles, so that I must for a moment consider how I ought to construe the words "eldest son" in this case in reference to the fact that there was property settled by deed of even date on the limitations I have mentioned.

It appears from a series of cases which have been quoted that where there is a term for raising portions for younger children, as it is sometimes put, or for children other than an eldest son, the question who are younger children and who is an eldest son ought prima facie to be determined at the time of the distribution of the portions fund, and that in construing the words "eldest son" the Court will not be bound to say that the eldest son is the person who originally answered that description, who was the firstborn son, but that it really means the person who may have become in the events that have happened an eldest son and who as such eldest son comes into actual enjoyment of the bulk of the estate. On the other hand I think it is equally clear that, in considering whether children who are in fact younger children have become eldest sons, the Court will not hold that a child who does not take the bulk of the estate has become an eldest son within the meaning of the clause though at the time of the distribution he is in fact the eldest child. There is also another series of decisions which goes to this, that in the case of portions the Courts will, if possible without doing violence to the language, construe the settlement so as to give vested interests in the case of sons at the latest at twenty-one years and in the case of daughters at the latest at twenty-one years or marriage. Of course, those two lines of decisions are to a certain extent contradictory, because the reason for giving a child a vested interest at an early period is to enable him to deal with his reversionary portion and to raise money on it, if necessary, and to provide for his family; to settle it or otherwise deal with it as if it were his own property and must remain his property; and of course no son could do that if his interest, even though vested,

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were liable to be divested by reason of his becoming an eldest son prior to the death of his parent. Those two lines of cases have long been present to the minds of conveyancers, and I think it is clear that in the precedents to be found in Davidson's Precedents in Conveyancing the form given has been adopted so as to avoid the difficulty of preventing a portion given to a son who is in fact a younger son at the age of twenty-one being divested by his subsequently becoming an eldest son. The form adopted by Davidson is an exception of the first or only son or other son who under the age of twenty-one years becomes entitled for an estate tail immediately expectant on his father's interest, or words to a similar effect. It is quite clear to my mind that that form has been adopted for the sake of preventing difficulties arising because a portion vested at twenty-one might otherwise be divested. That being the case, in approaching this particular settlement, where the words are an "eldest or only son or other son who before attaining the age of twenty-one years shall be or become the heir male or heir male apparent of the said Arthur Wrottesley," the father, I should naturally suppose the object of the words was to prevent any difficulty as to vesting of portions or of interests at twenty-one.

The facts of the present case appear to be these: that the late Baron Wrottesley had an eldest son in the true sense of the word who attained the age of twenty-one, and that he disentailed the property with the consent of his father and resettled it to uses under which, in the events that have happened, a younger son in the proper sense of the word, namely, the present Lord Wrottesley, took a life interest. If the present Lord Wrottesley is to be excluded it must be because he, in the events that have happened, has become the eldest son, for clearly he did not become entitled to any interest by the death of his brother or otherwise before he attained the age of twenty-one years. Supposing he is an eldest son within the meaning of the clause, I have still to consider whether he became entitled to the estate or to the bulk of the estate so as to bring him within the original doctrine, and I have it laid down in several authorities, where the actual eldest son joins with his father in a disentailing assurance and the interests are altered so that the interest of the

younger son who actually comes into possession will be cut down to a life interest, that in that case he does not become the eldest son for any purpose whatever. That I think is clear from the cases of *Spencer* v. *Spencer* (1), *Macoubrey* v. *Jones* (2), *Adams* v. *Beck* (3), and the Irish case of *Tennison* v. *Moore*. (4) That being the case, it appears to me that, even if I read this clause as one to which the old series of cases with regard to an eldest son only is applicable, I shall be bound to come to the conclusion that the present lord never became an eldest son within the meaning of the clause, because he did not under the limitations of the settlement take the bulk of the estate, but only a life interest under a subsidiary settlement. On the other hand it appears to me that probably the correct view is that in a clause framed in this way, which contrasts an eldest son with a younger son who becomes entitled under the age of twenty-one to an estate or becomes under the age of twenty-one the heir-at-law of the existing person or the heir-at-law apparent of the existing person, "eldest son" can only mean the actual eldest son, particularly as from the conveyancing point of view the clause referring to minority has been expressly introduced in order to prevent a portion which has once vested from being divested.

It appears to me, therefore, that, whether I look upon it as a case to which the old line of cases applies, or whether I look upon it as a case where the old rules are excluded by express words, I must come to the conclusion that the present peer is entitled to share, and, if he is entitled to share, I do not think it is necessary for me to decide anything further on the matter. Supposing he had been excluded, then a question would have arisen whether the firstborn son might not possibly have come in in the events that have happened, but I do not think that now arises.

Solicitors for all parties: *Ullithorne, Currey & Co., for Neve, Thorneycroft & Co., Wolverhampton.*

(1) (1836) 8 Sim. 87.
(2) 2 K. & J. 684.
(3) 25 Beav. 648.
(4) (1850) 13 Ir. Eq. Rep. 424.

H. C. R.

C. A.
1911
March 30, 31.

TURNER *v.* TURNER.

[1910 T. 902.]

Administration—Debtor Legatee—Retainer — Set-off — Retainer of Legacy in satisfaction of Debt—Partnership Debt.

The principle that a legatee who is indebted to the testator's estate can receive nothing from the testator's bounty until he has brought into account the amount due in respect of the debt does not apply where the debt is owed by a partnership of which the legatee is a member.

Smith v. *Smith* (1861) 3 Giff. 263, explained and distinguished.

Appeal from a decision of Neville J.

Douglas Turner and his brother Bryant Turner had for many years past carried on business in partnership as merchants under the style of Abram Brooksbank & Co. In 1904 the firm was indebted to Mrs. Brooksbank in the sum of 5000*l.* and was also indebted to the Sheffield Banking Company, Limited, in a considerable sum. Mrs. Brooksbank was an aunt of Douglas and Bryant Turner. By an agreement dated July 2, 1904, made between Mrs. Brooksbank of the first part, Bryant and Douglas Turner of the second part, and the banking company of the third part, Mrs. Brooksbank charged the payment to the bank of the balance for the time being owing to them by the firm of Abram Brooksbank & Co. upon the sum of 5000*l.* owing to her by that firm, and she covenanted with the bank that if she should die without the affairs of the firm having been wound up in her lifetime and if at her death there should still be any debt owing from the firm to the banking company, then she would by her will bequeath an amount sufficient to cover at least the liability on her debt to Bryant and Douglas Turner or one of them in such proportions (if more than one) as she might think fit, but such undertaking was exclusively in favour of the banking company and was not intended to confer any right on Bryant and Douglas Turner or either of them.

By her will dated June 13, 1903, Mrs. Brooksbank gave to her nephew Bryant the sum of 1500*l.* and to her nephew Douglas

the sum of 1200*l.*, and she also bequeathed her residuary estate to Bryant and her niece Hannah Kate Bradbury in equal shares, and she appointed Bryant and two others trustees and executors of her will.

On April 23, 1904, she made a codicil to her will not material to the present purpose. On October 24, 1906, she made a second codicil to her will whereby, after reciting the agreement of July 2, 1904, and reciting that she had bequeathed to her nephew Douglas the sum of 1200*l.* and to her nephew Bryant the sum of 1500*l.* and one moiety of her residuary estate, she provided as follows: "Now I hereby direct my executors in the first place to set off the pecuniary bequests contained in my said will in favour of the said Bryant Turner against the debt which may be due to me at the time of my decease from the firm of Abram Brooksbank and Co. and not to resort to the legacy of 1200*l.* bequeathed to the said Douglas Turner unless and until the pecuniary bequests in favour of the said Bryant Turner shall be insufficient for discharge of the said indebtedness," and she directed that either the whole or so much of the legacy of 1200*l.* to Douglas as might not be required to be set off against the balance of the said debt should be held upon trust for his wife during her life or widowhood and after her death or remarriage upon trust for the children of Douglas who should attain twenty-one.

The testatrix died on March 10, 1909. At the date of her death the whole of the principal sum 5000*l.* was due from the firm to the estate, but all interest thereon had been paid. The legacy of 1500*l.* and the share of the residue bequeathed to Bryant exceeded the 5000*l.* due to her from the firm, and the executors appropriated 5000*l.* of the said legacy and share of residue in discharge of the liability of the firm. In April, 1910, the partnership was dissolved, and the question arose whether in the taking of the partnership accounts the debt of the firm to Mrs. Brooksbank ought to appear in the balance-sheet as an existing liability of the firm or whether the effect of the codicil was to wipe out the debt altogether. Douglas Turner took out an originating summons against Bryant Turner to have this question determined.

C. A. 1911 TURNER v. TURNER.

Neville J. held that the direction in the second codicil discharged Douglas from all liability to contribute to the amount deducted from the bequests to Bryant.

Bryant Turner appealed.

Levett, K.C., and *J. G. Wood*, for the appellant. It is settled law that a legatee who owes a debt to the testator is not entitled to receive anything out of the estate until he has brought into account the amount of the debt; he is treated as having so much of the estate in his pocket: *Cherry* v. *Boultbee* (1); *Courtenay* v. *Williams*. (2) And the same principle applies where the debt is not a several debt due from the legatee but is a debt due from a partnership firm of which the legatee is a member: *Smith* v. *Smith* (3); Williams on Executors, 10th ed. vol. i. p. 1049, note (*y*). That principle is to be borne in mind in considering the construction of this codicil. The testatrix by the direction in the codicil intended to throw the burden upon the appellant's share and to release the respondent's share, but she did not intend to interfere in any way with the rights of the partners inter se in the taking of the partnership accounts. Therefore in ascertaining the value of the respondent's share in the partnership the appellant is entitled to credit for the 5000*l.* which has been deducted from the gifts to him by the will.

Jenkins, K.C., and *Underhill*, for the respondent. The intention of the testatrix was to extinguish the debt of the firm altogether. The appellant's argument renders the direction in the codicil futile. [They cited *Synge* v. *Synge*. (4)]

Levett, K.C., in reply, referred to *In re Akerman*. (5)

COZENS-HARDY M.R. This is an appeal from a decision of Neville J. raising a question between partners in taking the partnership accounts. It involves, in my opinion, a rather important question of law and, incidentally, the construction of a very obscure codicil. Bryant and Douglas were two partners, and they, i.e. the firm, were indebted to their aunt in the sum of

(1) (1839) 4 My. & Cr. 442, 447.
(2) (1844) 3 Hare, 539, 553.
(3) 3 Giff. 263, 270.
(4) (1874) L. R. 9 Ch. 128.
(5) [1891] 3 Ch. 212.

5000*l.*; they were also indebted to their bankers in a considerable sum. The aunt was a party to an agreement which in my view has very little to do with the question before us, but she was a party to an agreement to which Bryant and Douglas and the bank were also parties. By that agreement she gave a charge in favour of the bank on her 5000*l.* debt and covenanted with the bank that she would by her testamentary instrument give to the nephews sufficient to clear off the balance of their indebtedness to her. In that state of things she made a will and a codicil. Under the will she left to Douglas a legacy of 1200*l.* and to Bryant a legacy of 1500*l.*, and she left to Bryant in addition a moiety of her residue. Of course she could not tell what her residue would amount to at her death. She then made a codicil on the construction of which the difficulty arises. The first point argued by Mr. Levett raises a question of law of interest and importance. Mr. Levett says that when a legatee is also a debtor of the testator the executors have a right of set-off or retainer, I care not for the moment what word you use, but the principle is that the legacy shall not be paid except out of the debt which is owing by the legatee to the testator. I do not doubt that principle. I think that the more logical and correct mode of explaining that doctrine is this: You, the debtor, have in your hands part of the assets of the testator and you cannot claim any part of the assets of the testator, out of which of course your legacy must be paid, without bringing into the estate that portion which is now in your pocket; or, in other words, your legacy must be treated as paid pro tanto out of the assets of the testator which you have in your pocket. I agree with Mr. Levett to that extent. But when he says that this doctrine applies also when the debtors are a firm, when the debt is joint and the legacies are given only to the individual partners, I part company with him. Some confusion exists as to the position of a debt due from a firm of A. and B. It has been said again and again, although quite wrongly, that partnership debts are joint and several. That is not so. The provisions of the Partnership Act, 1890, make that quite clear. By s. 9 of that Act every partner in a firm is liable jointly with the other partners for all debts and obligations

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of the firm; and after his death his estate is also severally liable in a due course of administration for such debts and obligations so far as they remain unsatisfied, but subject to the prior payment of his separate debts. It will be observed that there is a distinct difference between the position of a living partner and the position of the estate of a deceased partner quoad the creditor. Speaking for myself I do not appreciate how it can be the right or the duty of an executor to retain or set off against the debts of A. and B.—debts in respect of which A. could not be sued alone—a legacy to A. But it is said that the contrary has been decided long ago by Stuart V.-C. in *Smith* v. *Smith*.(1) That case is not in all respects well reported, but I think it is easy to see the ground upon which the Vice-Chancellor based his decision. In that case there were debts due from William Smith, who was a partner in a firm, and the Court held, according to the head-note, which is wrong, that the assignees of the firm indebted to the testator were not entitled to receive a legacy bequeathed to a member of the firm. William Smith was the member of the firm to whom the legacy was given, and the firm became bankrupt. It is perfectly settled law that under the bankruptcy law of that date the assignees were assignees not only of the joint estate but also of the separate estate of each partner; and it is also perfectly settled law that such separate estate was applicable first to the payment of the separate debts and next to the extent of the surplus to the payment of the joint debts. The point was argued by counsel, not as counsel for the joint estate, but as counsel for the assignees of the separate estate of William Smith, and the Vice-Chancellor seems to me to have based his judgment on that view. Mr. Bacon appeared for the assignees in bankruptcy of William Smith, not for the assignees in bankruptcy of the firm, although they were the same individuals; it was William Smith's assignees who were claiming in respect of his separate estate the legacy which was given to him. The Vice-Chancellor said this(2): "On the second point, the question is, whether the same principle applies where a debt is not due from the legatee, but from the partnership firm of which that legatee was a member. No direct authority

(1) 3 Giff. 263. (2) 3 Giff. 270.

has been cited on either side. It seems to me that the principle which governs the case is this, that the legatee shall not be entitled to receive out of the estate of the testator any part of the bounty intended for him by the testator until he has paid all his obligations in the shape of debts which may be due to that estate." Pausing there for a moment, William Smith's separate estate was liable to the testator's estate for the debt, and that I think is the entire explanation of the case. Then the learned Vice-Chancellor goes on: "That seems to be an intelligible principle; and it is one which was settled by Lord Cottenham in the case of *Cherry* v. *Boultbee*. (1) In that case Lord Cottenham said that the principle would be applicable, where the executor, who was bound to pay the legacy, was the same person who was entitled to receive payment of the debt. It seems to me that the principle which I have stated is countenanced by what was said by Lord Cottenham in that case. I cannot satisfy my mind that it would be an intelligible principle to act upon, or that I should be justified in making an order that the assignees of this bankrupt partner" —not the assignees of the firm—"should be allowed to receive the legacy given to an individual partner who is the legatee, so long as the partnership debt of the firm of which he was a member remains undischarged." That may or may not be a right decision; I am not prepared to say it was not correct; but it does not in any way support or warrant the proposition for which it was cited. It is consistent with the principle in *Cherry* v. *Boultbee* (1) because the testatrix's executors could have proved against the separate estate of William Smith, whose separate estate was vested in the assignees, and that brings us practically to the same position as though there had never been a firm and the debt had originally been due from the legatee. I think it right to deal expressly with that point because it is a question of general importance and general interest. I start therefore with the proposition that the executors had not as such any right to refuse to pay over the legacies to the individual partners by reason of the firm's debt; in other words that they had no right to apply these legacies to the satisfaction of the firm's

(1) 4 My. & Cr. 442.

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debt. [The Master of the Rolls then dealt with the question of construction and agreed with the decision of Neville J.]

FLETCHER MOULTON L.J., in concurring, said with regard to the question of law: It is clear to me that there is no power in an executor to retain a legacy to one partner of a firm in virtue of a partnership debt to the estate. I can see no authority and no justification or reason for the contrary doctrine. I fully accept the explanation of the case of *Smith* v. *Smith* (1) which the Master of the Rolls has given, and so interpreted it may have been correctly decided, but certainly it gives no justification for the principle contended for by Mr. Levett of setting off individual legacies against partnership debts. [The Lord Justice then dealt with the question of construction.]

BUCKLEY L.J. confined himself entirely to the question of construction.

Solicitors: *Elvey Robb & Welch, for Turner, Turner & Martin, Ipswich; Taylor & Bryden, for Branson & Son, Sheffield.*

(1) 3 Giff. 263.

H. B. H.

In re COOMBER.
COOMBER *v.* COOMBER.

C. A.
1911
April 4, 5.

[1908 C. 3859.]

Fiduciary Relation—Gift—Influence—Nature of Relation which will make Court set aside Gift—Dual Relation—Son managing Business for Mother—Gift induced by Natural Affection—Independent Advice.

It is not every fiduciary relation between a donor and donee which will induce a Court of Equity to set aside a gift, but only those special relations which from their nature raise a presumption of undue influence. It is sufficient if an independent adviser sees that the donor understands what he is doing and intends to do it; he need not advise him to do it or not to do it.

Decision of Neville J., ante, p. 174, affirmed, but on wider grounds.

Arthur Benjamin Coomber, who died on July 14, 1905, was at the date of his death entitled to a long lease of certain ale stores at which he carried on business as a retailer of beer. His son Harry Coomber had for many years assisted him in the business and for some years before his death acted as sole manager of the business. By his will A. B. Coomber left all his property to his wife, who survived him, absolutely. There was evidence, which the Court believed, that A. B. Coomber had expressed to his wife a wish that Harry Coomber should have the business. Until the date of the assignment hereinafter mentioned Harry Coomber continued to manage the business on behalf of his mother and also collected for her the rents of certain houses which had belonged to her husband.

On September 28, 1905, Mrs. Coomber executed an absolute assignment of the lease of the said ale stores and the goodwill of the business to Harry Coomber, and on the next day the licence for selling beer on the premises was assigned to him. There was no consideration for the assignment expressed in the deed. There was evidence that Harry Coomber had agreed to make his mother an allowance and had paid it up to her death; but the transaction was treated by the Court of Appeal as an absolute free gift. The assignment was prepared by a solicitor,

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who had acted for Mrs. Coomber in relation to her husband's estate, upon instructions given by her in an interview at which they were alone. He explained the draft assignment and saw that Mrs. Coomber knew and understood what she was doing, but he was not asked to give and did not give any advice as to whether she should do it or not.

Mrs. Coomber died on July 23, 1906, leaving three children, namely, the plaintiff, who was her eldest son, Harry Coomber, and a daughter.

This action was brought by the plaintiff against Harry Coomber and his sister claiming a declaration that Harry Coomber was a trustee of the lease, business, and licence for the persons interested in Mrs. Coomber's residuary estate. The chief ground of the action was that Harry Coomber was in a fiduciary relation to his mother, and a gift from her to him could not be valid unless he proved that she had independent advice.

Neville J. dismissed the action on the ground that the gift must be attributed to Mrs. Coomber's affection for her son and not to any fiduciary relation between them.

The plaintiff appealed.

Peterson, K.C., and *Boome*, for the appellant. In this case there was a fiduciary relation between the mother and son in regard to the particular property affected by the gift. Where such a fiduciary or confidential relation exists there is no need to prove undue influence. The Court will assume it, and a donee cannot support a gift unless he proves that there was no undue influence and that the donor had full information and independent advice: *Rhodes* v. *Bate* (1); *Powell* v. *Powell* (2); *Wright* v. *Carter*. (3)

The case comes within the second group mentioned by Lindley L.J. in *Allcard* v. *Skinner* (4), where the existence of a fiduciary relation throws the burden of proof upon the donee.

[BUCKLEY L.J. The rule cannot apply to every case of fiduciary relationship. Have you any case in which it was applied between a landowner and his bailiff?]

(1) (1865) L. R. 1 Ch. 252.
(2) [1900] 1 Ch. 243.
(3) [1903] 1 Ch. 27.
(4) (1887) 36 Ch. D. 145, 181.

In *Harris* v. *Tremenheere* (1) it was assumed that a bailiff was within the rule. The gift plainly could not stand if Mrs. Coomber were alive and disputed it. The independent advice was not sufficient. Farwell J. (as he then was) in *Powell* v. *Powell* (2) laid it down that the adviser must protect the donor against himself, and Neville J. has rightly followed him on this point.

Butcher, K.C., and *Cozens-Hardy*, for the respondents, were not called upon.

COZENS-HARDY M.R. This is an appeal from the decision of Neville J. declining to set aside an assignment of a leasehold property by Mrs. Coomber in favour of her son. The learned judge has decided the case on a ground which seems to me to be perfectly satisfactory and free from any serious doubt. I will deal with that part of the case first. The father of the respondent had been carrying on some wine stores or beer stores in the suburbs of London. He lived there. After his death his wife lived there; the husband having given all his property to his wife. Shortly after the husband's death (within three months of that event) the mother executed an assignment of this lease to her son Harry Coomber, the defendant, and respondent here. It was sought to set that transaction aside on the ground that Harry Coomber had been managing these beer stores for his father and in the interval, after the father's death until the assignment, for the mother. On the father's death something had to be done about the licence, and Harry Coomber, the son, naturally, and as it seems to me with perfect propriety, went to the police authorities and got a temporary transfer of the licence so that the business might go on. It was proved to the satisfaction of the learned judge that the mother, Mrs. Coomber, was told by her husband that it was his wish that Harry should have this property. That is proved not merely by Harry's testimony, but by his sister's testimony and by the testimony of a perfectly independent solicitor, who seems to have done his duty in the whole matter. He went to see the mother and she told him that it was her late husband's wish. She was influenced in

(1) (1808) 15 Ves. 34. (2) [1900] 1 Ch. 243.

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this transaction by affection for her son and by the desire to give effect to what she believed to be her husband's wishes; and on that simple ground it seems to me that the learned judge was quite right in saying that it was impossible to set aside this gift on the mere ground that there was a fiduciary relationship of Harry towards the mother during the few weeks, less than three months, which intervened between the death of Mr. Coomber and the execution of the deed.

That is the ground on which Neville J. made the decree which he did. I should have been quite content to leave the matter there and to say that on that ground the decision is beyond contest right; but a further question has been argued rather fully, and I am bound to say a few words about it. The learned judge in his judgment says: "Harry Coomber was, however, in the position of agent for his mother in carrying on the business before assignment. I think, therefore, that the burden of proof is upon him to rebut the presumption that the gift was induced by that relation." With great respect for the learned judge I do not agree in that statement. I think the proposition has been laid down by counsel here in far too wide and general terms. I do not think it is true to say that any confidential relation between donor and donee is sufficient to set up a presumption against the validity of the gift; or, in other words, that it is for the donee under the gift to establish that all such precautions have been taken as would admittedly be necessary in the case of some confidential relations. There are confidential relations in which there is a presumption of undue influence. Take the common case (I say the common case because it is one of which the books are full) of solicitor and client. A solicitor cannot, in ordinary circumstances, take a gift from his client in a matter in which he is the solicitor because there is from that relationship in itself a presumption of undue influence; a presumption which, of course, may be rebutted. It may be rebutted in various ways; most frequently by proving that the solicitor told his client, "I cannot take this unless you have independent advice; consult an independent solicitor, put the matter before him, and he must explain the matter fully to you." That is one instance. Another instance is, of course, where a

young person, whether male or female, immediately after attaining twenty-one, makes a gift to a parent or a person standing in loco parentis. When a gift is made under such circumstances, there is a presumption of undue influence which requires something to rebut it; but to apply that to every fiduciary relation and every relation of confidence is, I venture to think, not according to any authority and distinctly contrary to principle. So far from its being warranted by any authority it seems to me to be as plainly negatived by what Lord Eldon said in *Harris* v. *Tremenheere* (1) as it is possible to imagine. That was a case of an agent or attorney; and after saying that certain voluntary leases which had been granted to the agent were pure gifts, he continues: "With regard to those leases, I am not entrusted with a jurisdiction to say, what a delicate, or a prudent, consideration would have suggested: but upon reasons of public policy, though I must dismiss the bill as to those two leases also, I shall dismiss it as to them without costs. I cannot find any decision, authorizing me to say, that the defendant should not have taken these leases, as of the pure gift of his employer. I am quite ready to say, that, if I could find in the answer or the evidence the slightest hint, that the defendant laid before the testator any account of the value of the premises, that was not perfectly accurate, that would induce me to set them aside, whatever the parties intend, upon the general ground, that the principal never would be safe, if the agent could take a gift from him upon a representation, that was not most accurate and precise. There is no evidence of misrepresentation, circumvention, or any thing, improperly leading the testator to make these leases; that they were not the spontaneous fruit of his own generosity; not weighing the value or amount of the consideration, that should have been given, if it had been the subject of barter." Every word of that sentence seems to me to apply absolutely to the present case. There is no evidence of misrepresentation, or of circumvention, or of any improper conduct leading Mrs. Coomber to make this gift; it was the spontaneous fruit of her own generosity. It was not made after weighing the value of the consideration; it was simply an out and out gift by this lady

(1) 15 Ves. 34, 39.

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in favour of her son after having been carefully and properly advised by the solicitor as to what was the effect of what she was doing. Although it is unnecessary for the purpose of my decision, as it has been argued I think it right to say that although I agree entirely in the conclusion of the learned judge and accept all his reasons for the conclusion, I am not prepared to assent to that part of his judgment which seems to be in favour of the present appellant and against the respondent. For all these reasons I think the appeal wholly fails and must be dismissed with costs.

FLETCHER MOULTON L.J. I entirely agree with the judgment which the Master of the Rolls has just delivered. As to the facts of this case it appears to me quite clear that the mother of her own proper motion gave a gift to her son. There is not a trace of evidence that he attempted to influence his mother to do it or that he mixed himself up in the transaction in any way. We have the clearest evidence from the solicitor who carried out the transaction on behalf of the mother that she stated that she did it in order to carry out the wish of her deceased husband, and that he explained to her what was the nature of the act that she was about to do, and that she with great deliberation insisted that her intention was to do it. She even corrected an error into which the solicitor had fallen, which would have rendered the transaction more favourable to herself, and explained to him that she wanted it to be a free gift.

Under those circumstances what objection can be made to this transaction? It is said that the son was the manager of the stores and therefore was in a fiduciary relationship to his mother. This illustrates in a most striking form the danger of trusting to verbal formulæ. Fiduciary relations are of many different types; they extend from the relation of myself to an errand boy who is bound to bring me back my change up to the most intimate and confidential relations which can possibly exist between one party and another where the one is wholly in the hands of the other because of his infinite trust in him. All these are cases of fiduciary relations, and the Courts have again and again, in cases where there has been a fiduciary relation, interfered and

set aside acts which, between persons in a wholly independent position, would have been perfectly valid. Thereupon in some minds there arises the idea that if there is any fiduciary relation whatever any of these types of interference is warranted by it. They conclude that every kind of fiduciary relation justifies every kind of interference. Of course that is absurd. The nature of the fiduciary relation must be such that it justifies the interference. There is no class of case in which one ought more carefully to bear in mind the facts of the case, when one reads the judgment of the Court on those facts, than cases which relate to fiduciary and confidential relations and the action of the Court with regard to them. In my opinion there was absolutely nothing in the fiduciary relations of the mother and the son with regard to this house which in any way affected this transaction. It is possible that there might have been a transaction between the son and the mother, with regard to a purchase of this leasehold property, in which the son would have had to shew that he had given her full information in every possible way as to the value. But in this case the gift was not based on value in any way at all. The mother knew the house, she had lived in it for twenty years, and knew the son was managing it. She meant it to go to the son whatever its value was; and that wish of hers is not shewn to be brought about in any way by any—I will not say improper conduct of the son, but any—conduct which put any responsibility upon him in the matter. For these reasons I think that no objection whatever to this transaction can be based on the fact that the son managed the business.

There is one other point I wish to deal with. Again and again we have had it said, the lady did not have competent and independent advice; and it seems to be based on the fact that the solicitor did not say to her, I advise you to do it, or I would not advise you to do it. In my opinion that is not by any means necessary for the purpose of advice. I think that a solicitor best gives advice when he takes care that the client understands fully the nature of the act and the consequences of that act. He is not bound to say "I will advise you to do it"; or "if I were you I would do it"; or "if I were you I would not do it." Nothing of that kind is necessary for competent and independent

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advice. All that is necessary is that some independent person, free from any taint of the relationship, or of the consideration of interest which would affect the act, should put clearly before the person what are the nature and the consequences of the act. It is for adult persons of competent mind to decide whether they will do an act, and I do not think that independent and competent advice means independent and competent approval. It simply means that the advice shall be removed entirely from the suspected atmosphere; and that from the clear language of an independent mind, they should know precisely what they are doing. Of course when I say this I am referring only to adults who are competent to form an opinion. When a man takes upon himself the responsibility of advising those who are not adults, who are not persons capable of managing their own affairs in the broadest sense of the word, other conditions may arise; but in this case I am quite satisfied that if it had been necessary to shew that the mother had competent and independent advice the evidence of the lawyer shews that she had.

BUCKLEY L.J. I agree. The case, in my opinion, is quite plain. The decision of the learned judge is, I think, right upon either one of two grounds—the former one upon which he did not rely, but I do, and in respect of which I differ from him; the second one upon which he did rely, and in which I agree with him. The former is this: that there was not here any such fiduciary relation between the donor and the donee as that the gift can, on that ground, be called in question. It is not every fiduciary relation that calls this doctrine of equity into action. Between master and servant, between employer and bailiff or steward, there subsists, of course, a fiduciary relation; but there is no authority for the proposition that by reason of the existence of relations such as those a deed of gift from the one to the other can be set aside. This doctrine of equity does not rest upon the existence of a fiduciary relationship whatever be its nature. It rests upon the existence of such a fiduciary relationship as will lead the Court to infer undue influence, or knowledge in the one party concealed from the other, or other

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circumstances into which I need not go. This ground alone is sufficient to dispose of this appeal. In this respect I differ from the learned judge. He said, "I think, therefore, that the burden of proof is upon him"—that is upon the defendant—"to rebut the presumption that the gift was induced by that relation." There was, I think, no such presumption.

Secondly and independently, I think that it is shewn that as a matter of fact the mother, being entitled to do and competent to do that which she did, executed this deed of her own free will, moved thereto by the wish expressed by her late husband, and after her solicitor had explained to her what was the effect of what she was doing. Upon either of those two grounds the appellant necessarily fails. I think the appeal should be dismissed with costs.

Solicitors: *P. Caudwell; Corsellis & Berney.*

J. R. B.

In re CONNOLLY BROTHERS, LIMITED. WOOD *v.* CONNOLLY BROTHERS, LIMITED.

[1911 C. 469.]

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1911
PARKER J.
March 10, 15.
C. A.
April 6.

Lancaster Palatine Court — Jurisdiction of Chancery Division to restrain Proceedings in Palatine Action—Vexatious Proceeding—Receiver—Chancery of Lancaster Act, 1890 (53 & 54 *Vict. c.* 23), *ss.* 3, 4, 5.

Where a debenture-holder in a company carrying on business in the County Palatine of Lancaster (the debentures creating a first charge on all the company's assets and stipulating that the company should not create any subsequent charge in priority thereto) commenced a representative action in the Chancery Division of the High Court to enforce the debentures and gave notice of motion for the appointment of a receiver, and, before the motion came on for hearing, the owner of an equitable charge granted by the company after the issue of the debentures on land acquired by it in Manchester commenced an action in the Lancaster Palatine Court, with full knowledge of the High Court action, to enforce his security and obtained ex parte the appointment of a receiver, who was subsequently continued on notice, notwithstanding that in the meantime, to the knowledge of the Palatine Court, a different person had been appointed receiver in the High Court action:—

Held, upon a motion in the Chancery Division by the plaintiff in the High Court action for an injunction to restrain the plaintiff in the

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Palatine action, who had since been added as a defendant to the High Court action, from further proceeding with the Palatine action, that the Court had jurisdiction to grant the injunction, and that that jurisdiction ought to be exercised on the ground that the Palatine action was vexatious.

Except under extraordinary circumstances the Court ought not to appoint a receiver ex parte.

IN 1901 Connolly Brothers, Limited, which was a company carrying on business and owning property in the county of Lancaster, issued a series of first mortgage debentures for 30,000*l*. The debentures created a floating charge on all the property of the company and contained a provision that the company should not create any charge on any part of its property ranking either in priority to or pari passu with the first debentures. The debentures were further secured by a trust deed which specifically mortgaged certain property then belonging to the company to trustees as security for the debenture-holders and contained a floating charge on the rest of the company's property for the time being, and it also contained a provision against the creation of subsequent charges in priority to or pari passu with the debentures. In 1904 the company acquired a plot of land in Manchester, and in the same year granted an equitable charge on it by deposit of the title deeds in favour of Mary O'Reilly. This charge was now vested in John Joseph O'Reilly as administrator of her estate. In 1907 the company issued a second series of mortgage debentures which were secured by a supplemental trust deed.

On February 17, 1911, Frederick Wood, suing on behalf of himself and all other the holders of the first mortgage debentures, commenced an action in the Chancery Division of the High Court of Justice against the company, G. Rathbone, the holder of all the second debentures, and the Liverpool Mortgage Insurance Company, Limited, and J. W. Davidson, who were the trustees of the two debenture trust deeds, claiming an account of what was due on the first mortgage debentures, enforcement of those debentures by realization of the property and assets subject thereto, and so far as necessary execution of the trusts of the debenture trust deeds, and the appointment of a receiver and manager.

By special leave of the High Court, Wood served notice of motion for February 24, 1911, for an order appointing a receiver and manager. On February 21 O'Reilly, who was not then a party to the High Court action, but had heard of the notice of motion, commenced an action in the Court of Chancery of the County Palatine of Lancaster against the company and the debenture trustees only, claiming to enforce his equitable security by foreclosure or sale. On February 22 O'Reilly applied ex parte in his action to the Vice-Chancellor of the Palatine Court for, and obtained from him, an order appointing a receiver and manager over February 27. On February 24 Wood, the plaintiff in the High Court action, who did not then know of O'Reilly's proceedings, brought on his motion before Parker J., who was not informed of O'Reilly's proceedings, and he appointed a receiver and manager. Different persons were appointed receivers and managers by the two orders.

On February 27 O'Reilly moved before the Vice-Chancellor, on notice to the company and the trustees, that the receiver appointed in the Palatine action should be continued. Wood, who had found out what had happened, attended the application and explained what had been done in the High Court action to the Vice-Chancellor, who, nevertheless, made an order continuing the receiver appointed by him. Wood then amended his writ in the High Court action by making O'Reilly a defendant to that action, and moved on notice in that action that O'Reilly might be restrained by injunction of the High Court from further proceeding in the Palatine action or from continuing the receiver appointed in that action.

The motion was heard by Parker J. on March 10, 1911.

Romer, K.C., and *Sargant*, in support of the motion. We ask that the defendant O'Reilly may be restrained from proceeding with his action in the Palatine Court or from continuing his receiver in possession. The present action in the High Court was commenced and notice of motion in it for a receiver and manager was given before O'Reilly began his action in the Palatine Court, and when the plaintiff was unaware that O'Reilly

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held any security from the company. He commenced his action with full knowledge of what Wood had done and got a receiver appointed by the Palatine Court. Then, after a receiver and manager had been appointed by the High Court over property including that covered by his receivership, O'Reilly, with knowledge of the appointment of Wood's receiver, obtained an order of the Palatine Court continuing his own receiver. It is most inconvenient that the two actions should be allowed to go on concurrently. In our action, as now constituted, O'Reilly having been now made a defendant, all questions arising with reference to the priority of the company's incumbrancers can be determined. These questions cannot be determined in the Palatine action. As regards priority in commencing proceedings and otherwise the merits are altogether on the side of the plaintiff in the High Court action. It would be absurd if the costs of both actions were allowed to be incurred.

There is ample jurisdiction in the High Court to restrain a person from proceeding, with reference to the same property as that which is the subject of a High Court action, in the Palatine Court in an action subsequently commenced: *In re Swire.* (1) The Palatine Court has, on the other hand, no jurisdiction to restrain, and cannot take an undertaking to discontinue, actions in the High Court: *In re Alison's Trusts.* (2) The Palatine Court is in a sense an inferior Court, although it may have co-ordinate local jurisdiction with the High Court. Before the coming into operation of the Judicature Act, 1873, it was a common practice of the Court of Chancery to restrain persons from proceeding in other Courts. When the jurisdictions of that Court and other superior Courts were united in the High Court of Justice, it was provided by s. 24, sub-s. 5, of the Judicature Act, 1873, that no cause or proceeding at any time pending in the High Court or before the Court of Appeal should be restrained by prohibition or injunction, but that either of those Courts might direct a stay of proceedings in any cause or matter pending before it. That provision does not apply to the Palatine Court, and since it came into operation a judge of the Chancery Division has taken an undertaking from a plaintiff

(1) (1882) 21 Ch. D. 647. (2) (1878) 8 Ch. D. 1, 9.

in an action in the Palatine Court not to take certain proceedings therein: *Dyke* v. *Stephens.* (1)

According to *In re Alison's Trusts* (2) taking the undertaking was equivalent to granting an injunction, and *Dyke* v. *Stephens* (1) is therefore an authority for saying that the High Court may restrain proceedings in the Palatine Court.

The Courts have frequently expressed their abhorrence of such unseemly racing proceedings as those of the defendant O'Reilly —proceedings which have often resulted in jockeying.

A. G. Mathews, for the holder of the second debentures.

Andrewes-Uthwatt, for the trustees of the debenture trust deeds.

A. Grant, K.C., and *Cyril Hartree*, for the defendant O'Reilly. The High Court has no jurisdiction to restrain proceedings in the Palatine Court, and, if it had, it would not be right to remove the receiver appointed by the Palatine Court in this case. The object of the motion is really to remove that receiver, but a mere stay of the proceedings in the Palatine Court would not prevent the receiver appointed by that Court from remaining in possession. It is submitted that the Palatine Courts were superior Courts even before July 25, 1890, but since then the Court of Chancery of the County Palatine of Lancaster has undoubtedly been a superior Court. By s. 3 of the Chancery of Lancaster Act, 1890, which received the Royal assent on July 25, 1890, it is provided that from and after the passing of the Act that Court "shall, as regards all persons, bodies corporate, and property within or becoming subject to its jurisdiction, have and exercise the like powers and jurisdiction, and in a similar manner, and subject to the same restrictions in all respects, as the High Court in its Chancery Division now has and exercises, or may, under or by virtue of any Act of Parliament hereafter passed, and not expressly enacting to the contrary hereof, have and exercise, in respect of all persons, bodies corporate, and property within its jurisdiction."

Then s. 4 of the same Act provides that the Court of Appeal shall have the same jurisdiction as regards judgments and orders of the Lancaster Chancery Court as it has with respect to

(1) [1885] W. N. 177. (2) 8 Ch. D. 1, 9.

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judgments and orders of the High Court; and s. 5 provides for the transfer of certain causes and matters from the Palatine Court to the Chancery Division of the High Court—not by an order of the latter Court, but by an order of the Court of Appeal or the Palatine Court itself.

These provisions and s. 24, sub-s. 5, of the Judicature Act, 1873, put the Palatine Court, as regards the restraining of proceedings, in the same position as a Division of the High Court.

[PARKER J. Do you say that the Vice-Chancellor of the Palatine Court can restrain persons from proceeding in the High Court?]

Not unless the High Court can restrain proceedings in the Palatine Court. No reported case can be found in which an injunction has been granted by the High Court to restrain proceedings in the Palatine Court.

The proper procedure in the present case would be for the applicants either to apply to the Palatine Court to discharge its order, or to appeal to the Court of Appeal.

The Palatine Court is not an inferior Court. Even in the case of an inferior Court, a prohibition will not be granted in a cause properly within the jurisdiction of the inferior Court until that Court is exceeding its jurisdiction: *London Corporation* v. *Cox*. (1) And *Hedley* v. *Bates* (2), as explained in *Stannard* v. *Vestry of St. Giles, Camberwell* (3), shews that an injunction ought not to be granted to restrain proceedings in another Court unless a prohibition will lie.

The defendant O'Reilly claims priority in respect of his security over the first and second debentures on the principles laid down in *In re Valletort Sanitary Steam Laundry Co.* (4) and *In re Standard Rotary Machine Co.* (5)

No deadlock can arise in the face of the provisions in the Act of 1890 as to appeals and stay of proceedings. [They also referred to *The Recepta* (6) and to *In re Longdendale Cotton Spinning Co.* (7)]

(1) (1867) L. R. 2 H. L. 239.
(2) (1880) 13 Ch. D. 498.
(3) (1882) 20 Ch. D. 190, 196.
(4) [1903] 2 Ch. 654.
(5) (1906) 51 Sol. J. 48.
(6) [1893] P. 255.
(7) (1878) 8 Ch. D. 150.

Romer, K.C., in reply. The proceedings in the Palatine Court are defective for want of parties, and, if the proceedings there are allowed to go on, double costs will be incurred by the trustees.

Cur. adv. vult.

March 15. PARKER J. The plaintiffs in this action are the holders of part of an issue of 30,000*l.* first mortgage debentures of Connolly Brothers, Limited. The debentures create a floating charge on all the property of the company, and contain a provision precluding the company from creating any charge on any part of its property ranking in priority to or pari passu with the debentures. The debentures are further secured by a trust deed dated July 15, 1901, whereby certain properties then belonging to the company were specifically mortgaged to trustees as security for the debenture-holders, the deed also containing a floating charge on the rest of the company's property for the time being, with a like provision as to the creation of subsequent charges. On March 30, 1904, the company acquired a certain plot of land in Manchester, and on April 6 in the same year deposited the title deeds thereof with one Mary O'Reilly to secure an advance of 1000*l.*, giving her a memorandum of charge whereby they undertook to execute in her favour, when called upon, a legal mortgage of the property. The benefit of this equitable charge is now vested in the defendant J. J. O'Reilly as administrator of Mary O'Reilly's estate. In the year 1907 the company issued a second series of mortgage debentures, secured by a supplemental trust deed. The trustees of both trust deeds are the same persons.

On February 17, 1911, the plaintiffs issued the writ in this action to enforce their debentures, making the company, the second debenture holder, and the trustees defendants. The defendant J. J. O'Reilly was not originally a party, for the plaintiffs knew nothing of his equitable charge. The plaintiffs, by special leave, served notice of motion for February 24, asking for a receiver and manager. The defendant O'Reilly, having heard of this notice of motion, on February 21, 1911, issued a writ in the Chancery of the County Palatine against the company and the trustees, asking to enforce his security by

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foreclosure or sale, and on the next day he applied to the Vice-Chancellor ex parte for a receiver, and a receiver was appointed by the Vice-Chancellor over February 27. The defendant O'Reilly's affidavit in support of his ex parte application refers to the pending application before me, and, inasmuch as he deposes to his belief that Mary O'Reilly had no notice of the company being precluded from creating charges in priority to the existing debentures, it may be gathered that he is claiming priority over such debentures.

On February 24 the plaintiffs in this action brought on their motion for a receiver and manager. It was resisted by the trustees, but I appointed a receiver and manager in the usual way. When I made the order the plaintiffs were not aware, nor was I aware, nor did the trustees think fit to inform me, of the equitable charge in question or of the order made by the Vice-Chancellor. On February 27 the defendant O'Reilly moved before the Vice-Chancellor, on notice to the company and the trustees, that the receiver appointed by the Vice-Chancellor over February 27 should be continued. The plaintiffs, who had meanwhile become aware of what had happened, attended and explained to the Vice-Chancellor what had been done in this action. Nevertheless, the Vice-Chancellor made an order continuing the receiver appointed by him, probably because the defendant O'Reilly was not then a party to this action. The plaintiffs in this action thereupon amended their writ by making the defendant O'Reilly a party, and are moving to restrain him from continuing his action in the Palatine Court.

It appears fairly obvious that, so far as the defendant O'Reilly is concerned, this action and the action in the Palatine Court will involve precisely the same question, that is, the question whether the defendant O'Reilly's equitable charge is or is not postponed to the charge created by the first mortgage debentures. Clearly both actions ought not to be allowed to proceed. One ought certainly to be stayed, and it is really a matter of convenience only which ought to be stayed and which allowed to proceed. It is to be observed that I cannot properly stay this action altogether. It must go on as a debenture-holders' action, and, if the defendant O'Reilly's charge is postponed to the

charge of the debenture-holders, he is a certainly necessary party. Being a party, he can assert his priority, and, if he succeeds, will be entitled to be redeemed, or to have the action, as against him, dismissed with costs, which will be equivalent to a foreclosure decree in his favour. Further, the property the subject of his charge is not let, but has been in the possession of the defendant company as part of their business premises and has machinery on it. If it is to be sold, it will probably, if not certainly, fetch a better price if sold as part of a going concern. On the other hand, I doubt whether the action in the Palatine Court is properly constituted as to parties. Neither the plaintiffs in this action nor any other holders of first mortgage debentures are parties, though every holder of such debentures would appear to have a separate right of redemption. Further, it is doubtful whether process issuing from the Chancery of the Palatine Court could be served on every debenture-holder. It appears to me, therefore, that, as a matter of convenience, it is the Palatine action which ought to be stayed and not this action. The question as to the priority of the defendant O'Reilly's charge can either be determined at the trial or be made the subject of an inquiry. In any event there will be no difficulty in making the judgment or order of the Court as to priorities binding on all the debenture-holders.

The defendant O'Reilly, however, contends that, however strong might be the argument from convenience, I have no jurisdiction to restrain him from proceeding with his action in the Palatine Court. In my opinion, this contention cannot be sustained. It appears from the decision of the Court of Appeal in *In re Swire* (1) that I not only have this jurisdiction but ought in a proper case to exercise it. It was said that the effect of the Chancery of Lancaster Act, 1890, is to alter the law in this respect. In my opinion, the effect of that Act may be to enlarge the jurisdiction of the Palatine Court, but it in no way curtails the powers of the High Court. I cannot on the strength of that Act hold, as it was suggested I should, that the Palatine Court is in effect a Division of the High Court to which s. 24, sub-s. 5, of the Judicature Act, 1873, applies by analogy.

(1) 21 Ch. D. 647.

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It was further said that the jurisdiction to restrain proceedings in another Court is confined to proceedings in inferior Courts, and that since the Act in question the Palatine Court is not an inferior Court. In my opinion, the Act did not alter the status of the Palatine Court, and that it is an inferior Court, at any rate for all purposes relevant to the present case, appears from the case of *In re Alison's Trusts.* (1) The truth is that the terms " superior " and " inferior," as applied to Courts, are words of somewhat loose application, and it is, in my opinion, unnecessary to determine the precise status of the Palatine Court in order to arrive at the conclusion that the High Court can in a proper case restrain proceedings in the Palatine Court, just as it can restrain proceedings in foreign Courts, to which the words " superior " and " inferior " are wholly inapplicable.

Lastly, it was said that the true effect of the decision in *Hedley* v. *Bates* (2), as explained in the case of *Stannard* v. *Vestry of St. Giles, Camberwell* (3), is that no injunction to restrain proceedings in another Court ought to be granted unless prohibition will lie, and that prohibition lies only where a Court is exceeding its jurisdiction. I do not so read those cases. It appears to me that *Hedley* v. *Bates* (2) is a decision to the contrary, and *Stannard* v. *Vestry of St. Giles, Camberwell* (3) merely shews that where the matter in litigation in the inferior Court is within the jurisdiction of such Court, so that prohibition will not lie, an injunction will only be granted if the High Court has before it and is bound to decide other matters in dispute between the parties beyond the matter in litigation in the inferior Court. In other words, an injunction restraining proceedings in an inferior Court as to matters within its jurisdiction is only granted for reasons of convenience. As I have already pointed out, the action before me must go on whether that before the Vice-Chancellor is stayed or otherwise, and precisely the same point will arise in both actions, so that it is in the highest degree inconvenient that the action before the Vice-Chancellor should be allowed to proceed concurrently with this action.

I therefore think that the defendant O'Reilly ought to be

(1) 8 Ch. D. 1. (2) 13 Ch. D. 498.
(3) 20 Ch. D. 190.

restrained until further order from proceeding with or taking any step in the Palatine action. I understand the receiver appointed by the Vice-Chancellor is in actual possession, and, as he is an officer of the Palatine Court, I think the proper course would be to apply in that action for his discharge. I do not, however, propose to order such application at present. If the receiver in this action requires possession of the property, I do not think he can have it except upon the terms of being charged with a fair rent for the benefit of the defendant O'Reilly if he succeeds in establishing his priority. Further, if the receiver in this action does not require possession, I think I should allow the defendant O'Reilly, through his receiver, an opportunity of making it productive of income in some other way. This can be the subject of an application in chambers. Lastly, the costs of the Palatine action will have to be dealt with, and I will leave this also for further consideration.

I propose to make the costs of this motion costs in the action.

F. E.

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O'Reilly appealed. The appeal was heard on April 6, 1911.

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A. Grant, K.C., and *Cyril Hartree*, for the appellant. The Chancery Division of the High Court of Justice has no jurisdiction to restrain proceedings in the Palatine Court. The Palatine Court is not an inferior Court, but is a Court of co-ordinate jurisdiction with the Chancery Division. That was so even before the passing of the Chancery of Lancaster Act, 1890, but, whatever may have been the position of the Court prior to that date, as to which see *In re Alison's Trusts* (1), the reports of which in the *Weekly Reporter* and in the *Law Reports* are materially different, the Act of 1890 places the matter beyond doubt.

[FLETCHER MOULTON L.J. The application here was to restrain, not the Court, but a person.]

There is no power in the Chancery Division of the High Court to restrain a party in the Palatine Court from seeking such relief, in a matter within the jurisdiction of that Court, as he chooses. If there were, the Palatine Court would have a similar power in respect of proceedings in the High Court. As

(1) 8 Ch. D. 1; 26 W. R. 450.

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between two Courts of co-ordinate equitable jurisdiction the correct procedure is, not for one Court to stay the action in the other, but to apply to the Court in which the action is sought to be stayed. The order of Parker J. was made without jurisdiction and ought to be set aside: *Bullock* v. *Bullock* (1); *Davis* v. *Davis*. (2)

[*Romer*, K.C., referred to *Earl of Newburg* v. *Wren* (3) and Mitford's Pleadings in Chancery, 5th ed. p. 60.

BUCKLEY L.J. referred to *In re Swire*. (4)]

[The COURT intimated that except under extraordinary circumstances a receiver ought not to be appointed ex parte and expressed their disapproval of the Vice-Chancellor's order appointing a receiver.]

Romer, K.C., and *Sargant*, for the respondent. Parker J. had plainly jurisdiction to grant the injunction: *Harrison* v. *Gurney* (5); *Bushby* v. *Munday*. (6)

[BUCKLEY L.J. referred to *Hyman* v. *Helm*. (7)]

Here the appellant's action was vexatious and oppressive, and, the Court having jurisdiction to restrain the appellant from further proceeding with it, as a matter of convenience the injunction ought to be granted.

A. Grant, K.C., in reply. Assuming that the Court had jurisdiction to grant an injunction, that jurisdiction ought only to be exercised where the party sought to be restrained is (*a*) attempting to apply some common law rule which is inconsistent with equity, or (*b*) acting vexatiously. But it is not vexatious for a man to apply to a local Court for relief in a case where there is pending in another Court an action to which he was not a party. [He referred to *Carron Iron Co.* v. *Maclaren*. (8)]

COZENS-HARDY M.R. This is an appeal from an order of Parker J. restraining Mr. O'Reilly, the plaintiff in an action in the Palatine Court, from proceeding with that action until further order. Before I say anything more I think it is perhaps not necessary, but certainly desirable, that a formal amendment

(1) (1791) 3 Swans. 698.
(2) (1680) Finch, 451.
(3) (1683) 1 Vern. 220.
(4) 21 Ch. D. 647.
(5) (1821) 2 Jac. & W. 563.
(6) (1821) 5 Madd. 297.
(7) (1883) 24 Ch. D. 531, 540.
(8) (1855) 5 H. L. C. 416.

should be made in the writ of summons in the High Court action by adding the claim for an injunction to restrain the defendant O'Reilly from further proceeding with the Palatine action. The writ being so amended, the question is whether there was jurisdiction in Parker J. to grant the injunction, and, if there was jurisdiction, whether this is a case in which it was right and proper that he should exercise that jurisdiction. In order to consider that question it is necessary that I should shortly state the facts. [His Lordship stated the facts and observed that he had already expressed his opinion in the course of the argument upon the order of the Vice-Chancellor appointing a receiver ex parte, and he continued as follows:] The writ in the present action having been amended by adding O'Reilly as a defendant, it is an action in which the priority between O'Reilly and the first debenture holders can be ascertained and worked out, and I am disposed to think that it is the only action in which that question can be fully and properly worked out. It is clear that the High Court action must go on because the Palatine action, even if it were prosecuted to the bitter end, would not work out all that is required in the High Court action, since O'Reilly does not claim a charge upon all the assets of the company, but only upon one specific asset. That being so, it is in my view too plain for argument that the Palatine action ought not to proceed, and that the High Court action, in which O'Reilly can obtain all the relief which he is entitled to obtain in the Palatine action, should proceed. The writ having been amended by adding O'Reilly as a defendant, on the same day notice of motion was served asking for an injunction to restrain him from further proceeding with the Palatine action, and Parker J. granted the injunction, not absolutely, but until further order only. It has been strenuously argued by Mr. Grant, who is naturally and properly jealous of the dignity and reputation of the Palatine Court, that the Palatine Court is not an inferior Court to the High Court; that it is a Court of absolutely co-ordinate jurisdiction, and that there is no jurisdiction in a judge of the High Court to grant an injunction restraining proceedings in the Palatine Court. I do not intend to touch upon the delicate topic of the precise position of the Palatine Court—whether

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it is on a footing of equality or inequality as compared with the High Court. I will assume that it is a Court of co-ordinate jurisdiction. What has that to do with the right of this Court, not to proceed by way of prohibition or certiorari, but simply to grant an injunction in personam against the defendant O'Reilly? If he is properly before the Court as a defendant in the present action, what has the position of the Palatine Court to do with the jurisdiction of the High Court to grant an injunction restraining him from proceeding with an action in the Palatine Court? It could not be disputed that, if O'Reilly had contracted not to commence proceedings in the Palatine Court, this Court would have had jurisdiction to grant an injunction to restrain him from so doing. But can it be seriously suggested that that jurisdiction is limited to cases of contract? In my opinion the jurisdiction must equally apply in a case where the Court holds that the conduct of the plaintiff in the foreign action, the defendant in the High Court action, is such that it is right and just and equitable that an injunction should be granted. It is enough to say that the jurisdiction of the Court in a case like this undoubtedly exists and ought to be exercised if the Court comes to the conclusion that the defendant in the High Court action, the plaintiff in the foreign action—in this case the Palatine action—acted vexatiously in instituting the proceedings in the foreign action; and from that point of view I have no hesitation in saying that the proceedings taken by O'Reilly in the Palatine action were vexatious and unreasonable to such an extent that the Court ought to exercise the jurisdiction which it plainly possesses to grant an injunction. To issue a writ in the Palatine Court with full knowledge of the proceedings in the High Court, to apply ex parte for a receiver, and to get that receiver into possession before the High Court could appoint its own receiver, and then to justify all these proceedings in the Palatine action on the ground that he was not made a party to the High Court action—the best possible reason for that being that the plaintiff in the High Court action was not aware of his claim—and to assert a right to prosecute the Palatine action to its end, does seem to me to be vexatious conduct of such a nature as to warrant the interference of the

Court. If authority were wanted on the point of jurisdiction I think that the passage in the judgment of Cotton L.J. in *Hyman* v. *Helm* (1) to which Buckley L.J. referred in the course of the argument is ample authority, but I am not quite sure that Cotton L.J. was correct in saying that the jurisdiction had never in any reported case been exercised until after decree. In *Bushby* v. *Munday* (2) there had been no decree at all. The plaintiff in that case sued upon a point in respect of which the Court of Session had full and equitable jurisdiction. After that proceeding had been commenced the defendant filed a bill in the Court of Chancery in England, and the Court, after disclaiming any authority over the Court of Session, as we equally now disclaim any authority over the Palatine Court, recognizing it, as we do, as an independent Court having jurisdiction in the matter here in issue, held, to quote the words of Sir John Leach (3), that "where parties defendants are resident in England, and brought by subpœna here, this Court has full authority to act upon them personally with respect to the subject of the suit, as the ends of justice require." In my opinion the ends of justice do require in this case that we should exercise the jurisdiction in the manner in which Parker J. exercised it, that is to say, that we should grant an injunction restraining O'Reilly from proceeding with the action in the Palatine Court until further order. That will not be such an order as will prevent the defendants in the Palatine action, if necessary, making an application to discharge the receiver in that action. For these reasons I think that the appeal fails and should be dismissed.

FLETCHER MOULTON L.J. I agree entirely with the judgment that has just been given and I have only a few words to add. I think that a great deal of time has been lost to-day by the counsel engaged in the argument not clearly distinguishing between the jurisdiction to make the order and the propriety of making it. As to the jurisdiction to make the order I have no doubt whatever. The passage which has been read from the

(1) 24 Ch. D. 531, 540. (2) 5 Madd. 297.
(3) 5 Madd. 307.

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judgment of Sir John Leach in *Bushby* v. *Munday* (1) puts clearly the basis of the jurisdiction, namely, that it is a jurisdiction in personam, and has nothing whatever to do with any conflict between the Courts. For the purposes of my judgment I assume, as the Master of the Rolls assumed, that the Court of the County Palatine is a Court of co-ordinate jurisdiction with the Chancery Division of the High Court of Justice. I give no opinion as to whether it is so or not, but I assume it because to my mind it makes no difference whether it is a Court of co-ordinate jurisdiction or a Court of inferior jurisdiction. A man has a right to bring an action in a Court of inferior jurisdiction when the circumstances of the case entitle him so to do, and if he is within his rights he is neither more nor less liable to be restrained from proceeding with an action in a Court of co-ordinate jurisdiction than he is from proceeding with an action in a Court of inferior jurisdiction. The question of jurisdiction to grant this injunction has nothing to do with the status of the Court. It has to do with the circumstances of the case as bearing on the conduct of the party enjoined. That being so, we turn to the propriety of making the order. The existence of this jurisdiction does not warrant the Court in exercising it on occasions when its exercise is not fully justified by the facts of the case. To restrain a man from proceeding with an action which prima facie he has a right to bring and to prosecute is a very serious thing. But when once we are satisfied that the jurisdiction exists we can consider the circumstances of the particular case; we are no longer bound by the fact that no case of exactly the same nature can be found in the books in which an injunction has been granted. Our duty is to ascertain the principle upon which the Court has granted the injunction and then to look at the circumstances of this case and see whether they bring it within that principle. It is quite clear that the Court has felt justified in exercising this jurisdiction where it is satisfied that it would be vexatious to let the other action proceed. Just as fraud assumes innumerable shapes so vexation may assume innumerable shapes. When I look at the facts of this case and consider how, when the

(1) 5 Madd. 307.

action in the High Court was sufficient for the determination of his rights, O'Reilly brought an action in the Palatine Court and obtained a receiver ex parte, knowing that there was a pending motion for a receiver in the other action, an action which was bound to proceed and an action in which his claim could be as well settled as in the Palatine action, I come to the conclusion that this is a case in which it would be thoroughly vexatious to allow the Palatine action to proceed. The Court, therefore, having the jurisdiction, and the facts of this case being such as to justify us in applying the principle on which the Court has exercised that jurisdiction, I have no doubt that we ought to dismiss this appeal.

BUCKLEY L.J. I concur in the order dismissing this appeal. I wish to say a few words to make quite plain, first, what we are not doing, and, secondly, what we are doing. The question is whether the order of Parker J., a judge of first instance of the High Court of Justice, restraining a party from taking proceedings in the County Palatine of Lancaster is right or not. What we are not doing is this. We are not asserting in any way that the High Court is superior to the Palatine Court; we recognize that the Palatine Court, in the language of the Chancery of Lancaster Act, 1890, is a Court having and exercising, within the limits of its jurisdiction, "the like powers and jurisdiction, and in a similar manner, and subject to the same restrictions in all respects, as the High Court in its Chancery Division now has and exercises." Parker J. in making the order under appeal was not in any way restraining or affecting the powers of the Court of the County Palatine. Secondly, what we are doing is this. We are restraining a person from taking further proceedings in the Palatine Court. Now, proceedings by a person may be restrained, I apprehend, upon any one of at least three grounds —no more occur to me for the moment. First, by reason of contract; secondly, by reason of conduct; and, thirdly, by reason of the fact that it is shewn that the proceedings are vexatious or oppressive. The case under appeal is that of a mortgagee, in whom resides a right as mortgagee to take proceedings to enforce his security. He was entitled to take proceedings

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in any Court in this realm which had jurisdiction to deal with the matter and he was entitled to go to the Palatine Court having regard to the residence of the parties in the action. But I think that it is plainly made out here that in resorting to the Palatine Court he was proceeding vexatiously and oppressively. It is impossible to take the view that in the previous proceedings which had been instituted in the High Court he would not have had the benefit of obtaining all the rights to which he was entitled as mortgagee. His object was to intercept those proceedings if he could. The writ in those proceedings was issued on February 17. He issued his writ in the Palatine Court on February 21 and made the application for a receiver which has been detailed. I think it is true as a general proposition that a person in the position of a mortgagee is entitled to say up to decree in the first action "It does not follow that the plaintiff in the first action will go on. I will take independent proceedings to enforce my security. I have reason to believe that the plaintiff will not go on." If he establishes that, he may be justified in taking other proceedings; but that is not the case here. The present case is one in which, although there is no decree, it is obvious that the person who takes the other proceedings does so because he is afraid that there will be a decree, not because he is afraid that there will not be a decree, and his object is to intercept that decree. It is on that ground that I concur in thinking that this order should be affirmed. In my view the plaintiff resorted to the Palatine Court for a purpose which was not legitimate and his proceedings were vexatious and oppressive. On that ground this Court is fully entitled, not to interfere with the other Court, but to prevent the party from further prosecuting his action in the other Court. I therefore agree that this appeal should be dismissed.

Solicitors for the plaintiff and the second debenture holder: *F. C. Mathews & Co., for J. Leigh Wells & Co., Manchester.*

Solicitors for the defendant O'Reilly: *Ford & Ford, for Richard Higham & Co., Manchester.*

Solicitors for the trustees: *Sharpe, Pritchard & Co., for Alsop, Stevens, Crooks & Co., Liverpool.*

H. B. H.

In re RAMEL SYNDICATE, LIMITED.

NEVILLE J.

1911

April 25.

[5771 of 1911.]

Company — Winding-up — Articles of Association — Meaning of "Surplus Assets."

The capital of a company consisted of 5000 shares of 1*l.* each, called A shares, and 5000 shares of 1*s.* each, called B shares. The articles of association provided that in the event of a winding-up the surplus assets should be divided into two moieties, one of which should belong to and be distributed amongst the holders of the A shares, and the other amongst the holders of the B shares, and that the profits available for distribution should be divided in the same way. All the shares had been paid in full. The company was in voluntary liquidation. The liquidator had paid the debts of the company and the costs of winding up and had a balance in his hands. He took out this summons for the determination of the question how the balance ought to be divided between the two classes of shareholders:—

Held, that surplus assets in this case meant the surplus after payment of outside liabilities and repayment to the shareholders of capital paid up.

Semble: In every case where surplus assets are directed to be divided between two classes of shares without reference to the nominal amounts of the shares or the amounts paid up, there is a presumption that surplus assets means a surplus after payment of outside liabilities and repayment of capital, and it needs clear and express words to give the phrase the meaning of surplus after payment of debts and costs only.

The Ramel Syndicate, Limited, was incorporated on March 3, 1905.

The memorandum contained the clause "The capital of the company is 5250*l.* divided into 5000 shares of 1*l.* each and 5000 shares of one shilling each, with power to increase and with power from time to time to issue any shares of the original or new capital with any preference or priority in the payment of dividends or the distribution of assets, or otherwise over any other shares," but did not contain any provision fixing the rights of the two classes of shares.

The articles contained the following clauses:—

"(2.) The 5000 shares of the original capital of 1*l.* each shall be A shares and the 5000 shares of 1*s.* each shall be B shares. Each class of shares shall respectively be entitled to rank for the purposes of dividend in the manner hereinafter declared.

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"(3.) In the event of the winding up of the company the surplus assets shall be divided into two moieties, one of which shall belong to and be distributed amongst the holders of the A shares and the other amongst the holders of the B shares.

"(4.) Subject to the provisions of the last two preceding articles the shares of the original capital of the company may be allotted, or otherwise disposed of, to such persons and for such consideration, and upon such terms and conditions as the board may determine; and they may make arrangements on the issue of any shares for a difference between the holders of such shares in the amount of calls to be paid and the time of payment of such calls."

"(41.) Subject to any special terms as to voting upon which any shares may be issued, every member shall have one vote in respect of each share held by him."

"(74.) The company in general meeting may declare a dividend to be paid to the members according to their rights and interests in the profits.

"(75.) Subject to any priorities that may be given upon the issue of any new shares, the profits of the company available for distribution shall be divided into two moieties, one of which shall be distributed amongst the holders of A shares and the other amongst the holders of B shares."

The company was formed to acquire a patent for the manufacture of artificial silk. It was intended to promote a larger company to take over and work the patent. No such larger company was ever formed, and the company never earned any money. On March 5, 1909, a special resolution for a voluntary winding-up was passed and a liquidator appointed. All the shares of both classes had been issued and were fully paid. The liquidator had in hand from payments made on shares more than enough to pay all the debts of the company and the costs of the winding-up. He took out this summons on February 22, 1911, for the determination of the question upon what principles and in what shares and proportions the surplus assets of the company, after satisfying its liabilities and the costs of the winding-up, ought to be distributed as between the holders of A and B shares respectively.

G. C. Rankin, for the liquidator.

E. W. Hansell, for holders of A shares. It is settled that the phrase "surplus assets" is not a term of art with a definite technical meaning; it must be construed in each case according to the intention to be found in the articles as a whole. It may mean the surplus remaining after payment of debts and costs, or after payment of debts and costs and repayment to the shareholders of their paid-up capital. In *In re New Transvaal Co.* (1) Vaughan Williams J. (as he then was) held that the latter construction must prevail because the surplus assets were to be divided in the same shares as the profits, and therefore shewed that the surplus intended to be dealt with was analogous to that which could be divided as profits during the life of the company. That case was followed in *In re Peabody Gold Mining Corporation* (2), though there were some additional words in the article which seemed to tell against that construction. Any other construction would lead to injustice. *Birch* v. *Cropper* (3), the case in the House of Lords to which Vaughan Williams J. referred, does not throw much light on this case, for there it was admitted that the paid-up capital must be returned, and the question was whether the surplus remaining after that was done should be divided equally among all the shares subscribed or according to the amounts which had been paid up.

A. H. Woolf, for holders of B shares. It is admitted that the phrase surplus assets may have either of the two meanings suggested. In *In re New Transvaal Co.* (1) Vaughan Williams J. said that the phrase was to be construed according to the analogy of the provision as to division of profits. In this case article 75 provides that the profits are to be divided into two equal parts and one part is to belong to each class of shares. The surplus assets ought therefore to be divided in the same way, without applying any part in repayment of capital to the holders of A shares. The whole scheme of the articles is that the two classes of shares, though differing in nominal amount, were to be in all respects on an equality. They have the same voting

(1) [1896] 2 Ch. 750.
(2) [1897] W. N. 170.
(3) (1889) 14 App. Cas. 525, reported before the Court of Appeal sub nom. *In re Bridgewater Navigation Co.*, (1888) 39 Ch. D. 1.

NEVILLE J. power, and an equal share in the profits. During the lifetime of the company the B shares sold at a higher price than the A shares. The nominal value of the B shares was fixed at 1*s.* merely to save expense in the registration of the company; they were intended to have the same rights in all respects as if they had been 1*l.* shares issued as fully paid. [He also referred to *In re Crichton's Oil Co.* (1).]

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NEVILLE J. In my opinion this question depends upon the proper meaning to be given to the articles of association of the company. The term "surplus assets" is in itself ambiguous; it may mean surplus after discharging outside liabilities, and it may mean surplus after discharging outside liabilities and returning the capital subscribed by the shareholders. Which does it mean in the present case? Two cases have been cited to me, one, *In re New Transvaal Co.* (2), before Vaughan Williams J., and the other, *In re Peabody Gold Mining Corporation* (3), before Wright J., in which it was held that the meaning of surplus assets was surplus assets after the return of capital, and I think, if I may say so, Buckley L.J., on p. 396 of his book (9th ed.), indicates precisely the ground of those decisions when he says that "in two cases where 'surplus assets' were divisible between different classes of shares without reference (as between the respective classes) to the nominal amount of, or to the amounts paid on, the shares, the expression was construed to have the latter meaning." It seems to me that where those circumstances exist the probability is that the meaning intended was after repayment of capital, and not merely after repayment of outside liabilities. Otherwise the result would be that, if the realized assets of a company were sufficient to discharge the liabilities and to leave something for repayment to the shareholders, but no profits, some of the shareholders would make a loss, while others might make a very large profit, derived from the capital subscribed by the former. Of course if shareholders choose so to agree, there is no reason why they should not, but I think that some clear words are necessary to shew that that was

(1) [1902] 2 Ch. 86. (2) [1896] 2 Ch. 750.
(3) [1897] W. N. 170.

the intention of the shareholders inter se. The circumstances in the present case indicate an intention that the surplus assets (which article 3 provides shall be divided into two moieties, one of which shall belong to and be distributed among the holders of the A shares, and the other among the holders of the B shares) were to be something capable of division as profits, and not a fund to be raised by contribution by some of the shareholders for the profit of the rest. Here the ordinary shares were 1*l.* shares and the founders' shares were 1*s.* shares, and the principle with regard to the division of profits was that the profits should be divided into moieties, one moiety going to the holders of the A shares, and the other to the holders of the B or founders' shares, and it seems to me that the division in the case of a liquidation is of the same nature and subject to the ordinary right of the shareholders in the first instance to have their capital repaid.

I think the costs ought to come out of the assets.

Solicitors: *Mawby, Mawby & Morris; Telfer Leviansky & Co.*

J. R. B.

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April 11.

In re GREEN'S APPLICATION.

[1910 J. 096.]

Patent—Revocation—Patented Article or Process manufactured or carried on exclusively or mainly outside the United Kingdom—Process—Cessation of Business—Sale of remaining Stock—Patents and Designs Act, 1907 (7 *Edw.* 7, *c.* 29), *s.* 27, *sub-s.* 1.

In considering whether a patent ought to be revoked under s. 27, sub-s. 1, of the Patents and Designs Act, 1907, on the ground that the "patented article or process is manufactured or carried on exclusively or mainly outside the United Kingdom," the Court is not bound to determine that at the precise moment when the petition was lodged there was a manufacture of the patented article or a carrying on of the patented process; a temporary cessation of manufacture and a sale of stock in the meantime will not prevent the operation of the sub-section; but where the manufacture and business are entirely and permanently stopped the section will not apply merely because the remaining stock is sold after the business has come to an end.

Appeal from a decision of the Comptroller revoking a patent under s. 27 of the Patents and Designs Act, 1907.

Messrs. Jonkergouw and Destrez invented a new process relating to the manufacture of glass and obtained a patent for it in France. A French société anonyme (hereinafter called the company) was registered in 1906 for the purpose of working this invention, and the present appellant, M. Demougeot, gave the company considerable financial assistance. In 1906 Messrs. Jonkergouw and Destrez obtained a patent for their process in England dated April 11, 1906, that being the date of the first foreign application (in France). The company did not manufacture in the United Kingdom; their works were near Paris, and they continued to manufacture glass articles under their process till their works were flooded in January, 1910. The result of the floods was that the manufacture was completely stopped and the electric current for the furnaces and machinery cut off, although sales of articles in stock continued.

In February, 1910, the company went into liquidation. All the employees of the company except five of the most skilled workmen were dismissed, and the latter were also dismissed in April, 1910,

and the works finally closed by the liquidator. On July 25, 1910, the whole of the assets of the company, including the patents, were sold to M. Demougeot.

On April 25, 1910, W. L. Green applied for revocation of the English patent on the ground that the patented process was carried on exclusively or mainly outside the United Kingdom. Owing to want of notice or want of funds no appearance was entered for the patentees or the company or the liquidator, and the matter came before the Comptroller on July 14, 1910, as an undefended application. Evidence was given by the applicant to the effect that the patented process had not been carried on in the United Kingdom, but had been carried on in France since 1906. The hearing was adjourned for further evidence, and an affidavit was filed stating that the process had been continuously carried on in France up to May 26, 1910. In the absence of rebutting evidence the Comptroller held that the evidence was sufficient and that no satisfactory reason had been given why the process had not been worked in this country, and on July 26, 1910, he made an order revoking the patent.

M. Demougeot filed this petition by way of appeal from the Comptroller's order, and alleged that there had been no manufacture anywhere since January, 1910. In November, 1910, it was decided by Parker J. that he was entitled to appeal, and leave was given to him to file evidence.

A. J. Walter, K.C., and *H. Fletcher Moulton*, for the appellant. This patent ought not to be revoked. The period of four years after the date of the patent fixed by s. 27, sub-s. 1, of the Patents and Designs Act, 1907, expired on April 11, 1910, and no application for revocation of the patent could be made before that date. The applicant for revocation has to shew under that section that the patented process has been manufactured or carried on exclusively or mainly outside the United Kingdom. In this case that cannot be done, for nothing has been manufactured or carried on since the floods in January, 1910. The evidence to the contrary is untrue and will not be believed. The French company has ceased to exist and the manufacture cannot be recommenced.

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A. B. Shaw, for the respondent. Some work was being done in France till after the date of the petition for revocation; it is admitted that none has ever been done within the United Kingdom, and the Comptroller was justified in revoking the patent. At all events, there has been a carrying on of the business even if there has been no manufacture. Stock has been sold, and that is sufficient to bring this within the section. The fact that manufacture has been stopped for a short time cannot enable the patentees to escape the penalty. If a man manufactures exclusively abroad for three and three-quarter years and then stops manufacturing but goes on selling stock, he is within the Act. He cannot evade the section by stopping working a few days before the end of the four years, or by a temporary suspension of work and a sale of the business as a going concern to a man who intends to revive it. The Act does not mean that it must be shewn that the manufacture went on for the whole of the four years.

Sargant, for the Attorney-General.

PARKER J. It appears to me that in this case only one decision is possible, and that is that the order of the Comptroller, made on evidence totally different from that which is before me, ought to be discharged. A question has been suggested as regards the construction of s. 27, sub-s. 1, of the Patents and Designs Act, 1907. It is said that although it has laid down that the state of circumstances justifying an application for revocation of a patent is "that the patented article or process is manufactured or carried on exclusively or mainly outside the United Kingdom," the Legislature did not really mean what it said. In my opinion no argument of that sort is justified. As I have pointed out on other occasions, this is a penal section, imposing severe loss, it may be, on the patentees if they do not comply with the provisions of the Act with regard to manufacture in this country. In every case which comes before the Comptroller or which comes before this Court it appears to me that the Comptroller on the one hand and this Court on the other must be satisfied, before a patent can be revoked, that the patented article or process is manufactured or

carried on exclusively or mainly outside the United Kingdom. In coming to a conclusion I do not think that either the Comptroller or the Court is bound to say that at the precise moment, or on the particular day, or even within a week of the time when the petition was lodged there was a manufacture of the article or the carrying on of the process. The substance of the matter must be looked at. If, for instance, the petition is lodged on a Saturday after office hours, when no manufacture is being carried on, or if from the exigencies of business, because there has been an over-manufacture in prior months, the manufacture has been temporarily suspended, I do not think the jurisdiction of the Court would be excluded on that account.

But here we have entirely different circumstances. The French company, who owned the patent, manufactured in France, and they manufactured up till some date in January, 1910, not very successfully, but still they did manufacture, or rather perhaps I should say they carried on the patented process, the patent in this case being a process patent. In January, 1910, all manufacturing under that process was stopped by reason of the floods in Paris, and the floods were so serious that the company had to go into liquidation, and at the date when the petition was lodged was in liquidation; and all work ceased as from January, and not till this day has any work been recommenced. I therefore have this, that for three months before the petition to revoke the patent was lodged there had been no carrying on of the patented process outside the United Kingdom at all; and the reason for that was not any temporary suspension of manufacturing or carrying on the patented process, but a permanent stop put to the manufacture by reason of the floods and the consequent liquidation of the company.

None of that evidence appears to have been before the Comptroller when he gave his decision; but the Comptroller did take the point when first the matter came before him that he was not satisfied that the process was being carried on abroad at all. The matter was accordingly adjourned for further evidence, and on the adjourned application an affidavit was put before him, made by one of the workmen in France, who declared that up to May 24 manufacturing had actually been going on at these

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works. Now I do not want to reflect more strongly than is necessary upon the evidence that is before me, but I think both in that affidavit and in other affidavits that have been read before me on this occasion the deponents have strained the truth to a very great extent, even if they have not deliberately and knowingly said what they knew to be untrue. I need not deal further with the question of evidence, because it is now admitted that the facts as I have stated them are correct. Under those circumstances I have no course open to me but to discharge the order made by the Comptroller, and I think I ought to direct the respondents to this petition to pay the costs of the petition, other than those which I directed on the last occasion to be theirs in any event, and to pay also the costs of the appearance of the Attorney-General on this occasion.

Solicitors: *Burchells; James, Mellor, Coleman & James; Solicitor to the Board of Trade.*

H. C. R.

EVE J. 1911 *March* 10, 13, 14, 15, 16.

PALMER *v.* EMERSON.

[1909 P. 1178]

Trustee — Investment — Breach of Trust — Insufficient Security — Mortgage — Trade Buildings — Advance of more than one half the Value — No independent Valuation — Trustees acting "reasonably" — Trustee Act, 1893 (56 & 57 *Vict. c.* 53), *ss.* 8, 9—*Judicial Trustees Act*, 1896 (59 & 60 *Vict. c.* 35), *s.* 3.

There is no fixed rule that in all cases where a portion of the premises upon which mortgage money is lent is utilized for business purposes, trustees would be guilty of a breach of trust in advancing more than a moiety of the value of the property; but if the mortgaged premises and the business are so inseparable that the discontinuance of the business may result in depreciation of the premises, trustees ought not to advance more than one half.

Sect. 8 of the Trustee Act, 1893, is a relieving section, and does not impose a statutory obligation upon trustees to take a valuation, and the neglect to do so does not exclude them from the benevolent operation of s. 3 of the Judicial Trustees Act, 1896.

In April, 1899, the trustees of a settled legacy of 3500*l.* invested this trust money upon mortgage of two blocks of freehold house property in Norwich, a portion of the premises being used for the purposes of a

butcher's business of forty years' standing. A bank had previously allowed an overdraft of 6000*l.* upon the security of a deposit of the title deeds of the same property.

No independent valuation was made on behalf of the trustees at the time of making the advance. They relied upon a valuation made in September, 1896, for a different purpose, by a highly skilled valuer at Norwich, who valued the whole of the premises at 6550*l.* The butcher's business subsequently failed, and the premises became much depreciated in value and wholly insufficient to pay the settled legacy.

In an action by the beneficiaries under the settlement seeking to make the trustees liable for a breach of trust in investing upon an insufficient security:—

Held, on the evidence, that the value of the property at the time of the advance in 1899 was 5500*l.*, and having regard to all the circumstances which the trustees were entitled to take into consideration, they were justified in lending more than one half the value upon the portion used for business purposes, in order to make up the full loan of 3500*l.*, and were not liable for a breach of trust.

Held, further, that, even assuming that they had advanced a larger sum than was justifiable, they had acted reasonably within the Judicial Trustees Act, 1896, s. 3, and should be relieved from liability.

THE plaintiffs in the action were Selina Palmer (widow) and her daughter, Jane Palmer, beneficiaries under a settlement created by the will of Carlos Cooper, who died on October 20, 1897. The first two defendants, Matthew Sallitt Emerson and Richard Cobbett, were the present trustees of the settlement. The three last defendants, George Meyrick Palmer, Charles Cooper, and Hugh Hindley-Rainey, were the personal representatives of another trustee, Henry Cooper (a brother of Carlos Cooper), who died on November 25, 1908. One of the four original trustees did not accept or act in the trust.

By his will, dated March 16, 1895, Carlos Cooper bequeathed the sum of 3500*l.* to four trustees upon trust to invest the same and pay the income during her life to Selina Palmer, and after her death to pay the income during her life to Jane Palmer, and after the death of the survivor to pay the same to such person as Jane Palmer should by will appoint, and in default of appointment the testator directed that the principal sum should fall into and form part of the residuary estate which, under the will, passed to his brother, Henry Cooper.

On April 15, 1899, Henry Cooper and the defendants M. S. Emerson and Richard Cobbett advanced this sum of 3500*l.*

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coming to them from Mr. C. Cooper's executors upon the security of a mortgage at 4 per cent. upon two blocks of freehold house property situated in Bridge Street and Duke Street, Norwich, belonging to Messrs. R. Savage & Goddard, who carried on a business in partnership as butchers on part of the premises.

No independent valuation of the property was made on behalf of the trustees at the time of this advance. They relied upon a valuation made by a highly competent valuer, Mr. Benjamin Branford Morgan, on September 1, 1896, upon the instructions of Mr. Goddard, who had gone into partnership with Mr. R. Savage, and when there was an idea of forming a small company. This valuation made the total value of the two portions of the property 6550*l.*, being 2750*l.* for the Duke Street property, and 3800*l.* for the Bridge Street property, where the butcher's business was carried on and had been carried on for forty years.

In June, 1900, part of the mortgaged property was sold for 350*l.*, and 300*l.* part of this sum was invested by the trustees.

On October 20, 1900, Robert Savage executed a deed of assignment for the benefit of his creditors. The Stamford, Spalding, and Boston Banking Company, who had previously advanced 6000*l.* upon the security of a deposit of the title deeds of this property, and were now the second mortgagees of it for 2500*l.*, caused their security to be valued, and it was valued at 2000*l.* for the Bridge Street property and 1800*l.* for the Duke Street property.

Interest at the rate of 4 per cent. on the 3500*l.* was paid to Selina Palmer by the defendant M. S. Emerson down to the month of October, 1908, since which date no interest had been paid to her. The property had greatly depreciated in value and could not be realized.

The plaintiffs claimed a declaration that the trustees had committed a breach of trust by the investment of the sum of 3500*l.* on the mortgage security, and were jointly and severally liable to make good the loss.

There was evidence that Mr. M. S. Emerson, who was a solicitor of long standing at Norwich, and Mr. Richard Cobbett

had gone into the question of the advance carefully. On March 3, 1899, Mr. Emerson wrote to Mr. Cobbett, sending him the valuation of Mr. B. B. Morgan, and stating the fact that the Stamford, Spalding, and Boston Bank had advanced 6000*l.* upon a deposit of the title deeds and were content to have a second mortgage for the balance, 2500*l.*, and also that Mr. Cooper had seen the bank manager, who told him it was quite safe. To this letter Mr. Cobbett, who lived at Manchester, replied on March 7, 1899, saying that the security seemed good, but suggesting, inter alia, the following inquiries:—"Are Messrs. Robert Savage and Sons substantial people in themselves?

"Bridge Street property. What are the rentals of Nos. 1 and 2 respectively? The value of No. 1 appears to be considerably enhanced by the butcher's business carried on there. Assuming that the business was no longer carried on, what difference would it make in the value? Would it let readily for other purposes?"

Mr. Emerson replied, giving the rentals and other particulars, and saying that the business of Messrs. Savage & Goddard was the largest business of the kind in the city, and had been established upwards of forty years. Evidence of the value of the property in 1896 and 1899 was given by Mr. B. B. Morgan and several other valuers. The result of the evidence and the action of the trustees sufficiently appear from the judgment.

Stewart-Smith, K.C., and *W. A. Peck*, for the plaintiffs. We do not repudiate the security, but we say that too much was lent upon it. We submit that not more than one half of the value of the property should have been advanced.

Sect. 8 of the Trustee Act, 1893, only applies where a report has been made, and therefore does not apply to a case like this, in which we are thrown back upon the old law as summed up by Lord Watson in *Learoyd* v. *Whiteley* (1), in which he says that where the subject of the security derives its value from buildings erected upon the land, or its use for trade purposes, the margin ought not to be less than one half.

There was no report ad hoc in the present case. In *Ingle* v. *Partridge* (2) trustees advanced money solely on a valuation

(1) (1887) 12 App. Cas. 727, 733.

(2) (1865) 34 Beav. 411.

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made a year previously by the valuer employed on behalf of the mortgagor, and they had to make good the deficiency in the security. The trustees cannot claim the benefit of the Trustee Act, 1888: *In re Somerset.* (1)

If the trustees seek relief under the Judicial Trustees Act, 1896, the onus is on them to shew that they are entitled to relief, and there is no case of an excessive investment in which the Court has exercised the power of s. 3 of that Act in favour of a trustee. In the most recent reported case the trustee was held not to be entitled to relief on the ground that the trustee had not acted reasonably in making the investment; *In re Dive.* (2)

The Statute of Limitations cannot help the trustees except in the case of Selina Palmer, the tenant for life, and the principle of the decision in *In re Somerset* (1) does not apply.

Clayton, K.C., and *Galbraith*, for the defendant M. S. Emerson. The real question is whether the trustee has acted as a prudent person, and that overrides any question about a margin of one half or one-third. There are cases where more than two-thirds of the value has been advanced and yet the trustees have not been held liable: *In re Godfrey.* (3) Sir George Jessel M.R. says in *In re Speight* (4), "It seems to me that on general principles a trustee ought to conduct the business of the trust in the same manner that an ordinary prudent man of business would conduct his own, and that beyond that there is no liability or obligation on the trustee"; and in *In re Whiteley* (5) Cotton L.J. similarly states the law. The element of trade being carried on upon the premises or of unfinished buildings is proper to be considered, as the transaction as a whole must be looked at. The security here was a good investment at the time when it was made: *Shaw* v. *Cates.* (6)

J. M. Gover, for the defendant R. Cobbett. The standard by which reasonable conduct is to be judged is stated in *In re Stuart.* (7)

P. O. Lawrence, K.C., and *W. E. Greaves*, for the remaining defendants, also referred to *In re Turner.* (8)

(1) [1894] 1 Ch. 231.
(2) [1909] 1 Ch. 328.
(3) (1883) 23 Ch. D. 483.
(4) (1882) 22 Ch. D. 727, 739.
(5) (1886) 33 Ch. D. 347, 350.
(6) [1909] 1 Ch. 389.
(7) [1897] 2 Ch. 583.
(8) [1897] 1 Ch. 536.

Stewart-Smith, K.C., in reply. The valuation upon which the trustees relied was not the ordinary valuation for the purpose of a loan, it was not addressed to any one, and no sum was stated as a proper one to advance on such a security: *Shaw* v. *Cates*. (1) One half the amount of the valuation is all that can properly be advanced upon business or trade premises, as such property is of a fluctuating character. There is no case which justifies an investment up to two-thirds of the valuation upon such property. The general rule is one half of the actual value: *Stretton* v. *Ashmall* (2); *Stickney* v. *Sewell* (3); *In re Olive*. (4) The onus is upon the defendants to shew that there should be a departure from the general rule which the Court will not be inclined to relax.

[EVE J. You must first satisfy me that there is a rule to that effect.]

It is submitted that the cases cited do go to shew the existence of the rule in practice. The trustees are not entitled to relief under the Judicial Trustees Act, 1896, as they neglected elementary precautions in not getting a valuation, that which they relied upon being made for a different purpose. It was not acting reasonably within the meaning of the Act: *In re Dive*. (5) No inquiries were made as to the financial position of the intending mortgagors, nor were some pertinent questions in the letter of Mr. R. Cobbett of March 7, 1899, answered or complied with by Mr. Emerson.

EVE J., after shortly stating the will and the parties to the action, continued:—The action is of a distressing nature. No one who has listened to the evidence can feel anything but the sincerest sympathy with the plaintiffs, but one must be careful not to allow a feeling of deep sympathy with the plaintiffs to work any injustice towards the defendants. The 3500*l*. having been received from the executors of the late Mr. Carlos Cooper, who were not the same persons as the trustees of this legacy, was, on April 15, 1899, invested on mortgage of two freehold

(1) [1909] 1 Ch. 389.
(2) (1854) 3 Drew. 9.
(3) (1835) 1 My. & Cr. 8.
(4) (1886) 34 Ch. D. 70.
(5) [1909] 1 Ch. 328.

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shops and premises situate in Bridge Street and Duke Street, in the city of Norwich. The interest which it bore was 4 per cent. It is now, I think, quite clear that the property which remains, a portion having been sold and realized the sum of 300*l.* for the trust estate, is insufficient to pay the balance of the settled legacy, 3200*l.*, and this action is brought by the tenant for life in possession and the tenant for life in remainder, alleging that the advance of the 3500*l.* on the security to which I have referred was a breach of trust, and claiming that the defendants are jointly and severally liable to make good the amount of the loss thereby sustained.

I have chosen my words carefully because, when one looks at the pleadings and the particulars, that is the nature of the claim. It is not a claim founded upon any allegation that the property was property on which the trustees could not lawfully lend; the claim is that, it being a property on which they could lawfully lend, they lent a larger sum than was reasonable and proper for them to lend. The trustees claim the benefit of s. 9 of the Trustee Act, 1893, and contend, if they are liable at all, that they are only liable for the amount of the excess over and above that which could properly have been lent on this security; and in that contention I think the trustees are justified. Therefore it becomes material to consider, first, what was the value of the security upon which the 3500*l.* was advanced, and, secondly, what was the proportion of that value which these gentlemen could properly lend. If, on the examination of the evidence, I come to the conclusion that the 3500*l.* did not exceed the amount which the trustees could properly lend on this security, that conclusion disposes of the plaintiffs' claim. If, on the other hand, I come to the conclusion that the true amount which the trustees were justified in lending was something less than 3500*l.*, then I have this further question to consider, and that is whether I ought, in exercise of the power vested in the Court under the Judicial Trustees Act, 1896, to relieve the trustees, or any, and, if any, which of them, from the consequences of the breach of trust which I should thereby be holding they had committed. The first question, therefore, to which I direct my attention is what was the value of the security at the time

when the 3500*l.* was advanced upon it? Unfortunately for themselves, the trustees did not take those steps under s. 8 of the Trustee Act, 1893, which would have protected them, if they had followed them strictly. They did not have any valuation made under that section, but they did have certain materials, and they did take certain measures for ascertaining the value of the premises. These materials and further evidence have been produced at the trial. [His Lordship then considered at some length the valuations of the property given in evidence, and continued.] The result of that evidence, and more particularly of those parts of it which came into existence on occasions more nearly approaching the crucial date than the present time, leads me to the conclusion that this property would have been valued in April, 1899, at a sum approximating 5500*l.*

The question then arises, what proportion of that amount were the trustees justified in advancing? I think, with regard to the Duke Street property, which would represent about 2000*l.*, there was no reason why they should not advance up to the full two-thirds.

With regard to the other property, Mr. Morgan's 3800*l.* valuation has to be reduced by 380*l.*, on the footing that there was a depreciation of 10 per cent. between 1896 and 1899. That leaves, therefore, a value of some 3420*l.*, or (if I take 5500*l.* as the aggregate value of the two properties) 3500*l.*, and the question is whether they could have advanced up to two-thirds of that. In the view which I take of the figures it will be seen that, allowing that they could advance up to two-thirds of the valuation on Duke Street, it was not necessary for them to advance up to the same proportion on the Bridge Street property, in order to make up the 3500*l.* That means to say they advanced on the latter property a sum which is somewhere between a half and two-thirds of the valuation. Now, is there any rule which says that because a portion of the premises upon which the mortgage money so lent is utilized for business purposes the lender, if he is a trustee, is limited to advancing only one half of the valuation? I think Mr. Cobbett's criticism on Mr. Morgan's valuation of the Bridge Street property was entirely well founded. As a solicitor, he at once appreciated

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that the existence of the business was an element which had entered into that valuation, and that which struck him ought to have struck, and I assume did strike, his co-trustees. Therefore I think it was incumbent upon them to be cautious as to the amount which they lent on the Bridge Street property, but I failed to extract from the plaintiffs' counsel any authority which goes the length of laying down a rule that in all cases where a portion of the premises, or even the chief portion of the premises, is utilized for business purposes, that is to say, for a retail or a wholesale shop, trustees are guilty of a breach of trust in advancing more than a moiety of the value appearing in the valuation. I think the cases which have been cited do come to this, that, if the security is really a business plus the premises upon which it is carried on, trustees are well advised to have nothing to do with it; and further, if the premises and the business are so inseparable that the discontinuance of the business must or may result in depreciation of the premises, then the trustees ought not to advance more than one half. But where you have a freehold property situate in a busy thoroughfare in an important city, adaptable for various sorts of business, although, at the moment, utilized and adapted for a particular kind of business then being carried on, I do not think there is any rule which says that in that state of things trustees are limited to advancing only a moiety of the amount of the valuation.

There were certain other circumstances which the trustees were entitled, in my opinion, to take into consideration in determining the amount they could properly advance in this particular case.

In the first place, I think something was to be said for the fact that this business was an old-established business carried on for a period of forty years by men reputed to be wealthy, and known to be honourable tradesmen, and, so far as one could see, likely to be carried on for another forty years.

I do not, however, attach very much importance to that, but there was another thing which I think they were very much entitled to take into consideration. They were anxious to find a security for the 3500*l.*, and the circumstances in which this

particular security first came to their knowledge disclosed the fact that a banking company had advanced by way of an overdraft the sum of 6000*l.* on the security, not of a mortgage of these premises, but on a deposit with them of the title deeds. That, in itself, might not mean very much, because it sometimes happens that bankers have to go on allowing an overdraft to be increased, in spite of and altogether against their wishes, in order not to damage the credit of the tradesman, and thereby destroy the security which they already hold. But that was not the state of things here.

I do not know that the intending mortgagees knew all that we know now, that is to say that the account had then only recently been taken over by the bank upon the express terms that they would increase the overdraft and allow greater facilities than a rival bank had theretofore been allowing. But this they did know, that the bank manager was not anxious to have the 3500*l.* paid, that he expressed himself as quite content with his security, and that until he had referred the matter to the head office he was not disposed to fall in with the suggestion made by Mr. Cooper that the trustees should pay off 3500*l.* of the overdraft and become first mortgagees of the property. Further, the fact that the bank ultimately agreed to the proposal goes to justify the opinion of the trustees as to the value of the security, because the position of the bank holding the whole security to secure the 6000*l.* was legally, I think, preferable to the position they occupied when the 3500*l.* was repaid to them, and secured by a legal mortgage, and they remained only as second incumbrancers in respect of the 2500*l.* It is quite obvious from the evidence of the bank manager and Mr. Emerson that, at the time, the bank were perfectly well satisfied with their security; so satisfied that they were prepared to split it up in the manner in which Mr. Cooper and Mr. Emerson desired them to do. All those matters the trustees were entitled to take into account, and, unless there be, as I do not think there is, any hard and fast rule which prohibits trustees in those circumstances, and on such a security, lending more than one half of the amount of the valuation, I come to the conclusion that there was nothing peculiar to this particular property to

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debar these trustees from exceeding that one half, to the extent to which it was necessary to exceed it, on the Bridge Street property, in order to make up the full loan to 3500*l.* The result is that the trustees succeed on their main defence. I do not think the plaintiffs have made out the case which they started to make out, or have brought home to the trustees a liability to recoup any portion of this unfortunate loss. It may be that the case will go further, and that another tribunal may take a different view of the matters with which I have so far dealt, and so it becomes necessary for me to say what, in my opinion, is the position of the trustees, assuming that, in making an advance of 3500*l.*, they were advancing a larger sum than could properly be lent on this security. The question which I have to answer is this: Did they act reasonably in so doing? I put the question in that form because from first to last there is not the smallest suggestion of anything dishonest or discreditable on the part of any one of the trustees. Indeed, if I may be permitted to say so, one cannot help seeing that these trustees have acted as many other trustees do, with a great deal of generosity towards their cestuis que trust. But, however meritorious their conduct may have been in the main, all I am entitled to consider is their conduct in regard to the particular matter in reference to which, on this hypothesis, they have been guilty of a breach of trust. Now, much that I have said with regard to the matters justifying their view of the value of the property is applicable when one comes to consider the reasonableness of their conduct. It would have involved, of course, some delay and some expense to take a further valuation from Mr. Morgan. If the bank had shewn any dissatisfaction with their security; if there had been anything on the title to give rise to doubt; if there had been anything affecting the reputation or credit of Mr. Goddard, or Mr. Savage, which it had been shewn had come to the knowledge of the trustees, all such matters would undoubtedly have had to be taken into consideration in determining whether their conduct was reasonable or not. But, on the evidence, it is to my mind conclusively established that each and all of these gentlemen believed they were dealing with a sufficient and attractive security, and with men of honour and substance as their

mortgagors. Further than that, I think, in the case of two of them at least, they adopted those precautions which, having regard to their knowledge and their local habitations, were perhaps all that they could reasonably be expected to do. Mr. Cooper, who had experience and knowledge as a valuer of properties,—not in the city of Norwich but in Northampton and elsewhere in the Midlands—went and saw the premises, and he was very pleased with them. I have read his letters. He says "I saw it, and I thought it was an excellent security." Mr. Cobbett, who unfortunately lived at a distance, and who had been very unwillingly coerced—if I may use the expression—into taking up the trusteeship at all, went carefully through Mr. Morgan's valuation which Mr. Emerson sent to him, and he propounded a series of questions to Mr. Emerson which shewed that he had applied his mind to the whole situation in general, and to the reports in particular. It is much to be regretted that he did not appreciate at the moment that the reports were somewhat stale—two years or more old. But I accept unreservedly his explanation that the point really never occurred to him.

Now, with regard to Mr. Emerson. Mr. Emerson was a solicitor with nearly forty years' experience in Norwich; he had known this business more or less ever since it had been carried on. He knew the premises, and, of course, without knowing or being competent to say what was the actual value, he could form something in the way of an opinion as to the nature of the security, guided by the opinion of Mr. Morgan, and fortified by the approval of Mr. Cooper. The question arises, what else Mr. Emerson could or ought to have done? Looking back at it now, we know he ought to have insisted upon another valuation, but does the fact that he neglected so to do exclude him from the benevolent operation of the Judicial Trustees Act? Authority says no; authority which I welcome, because I cannot see in justice how it ought to do so, unless the taking of a valuation is to be treated as a statutory obligation upon trustees. Sect. 8 is really a relieving section, and not a section which imposes further obligations upon trustees. Again, although we now know, looking back with our judgment aided and illumined by subsequent events, that there were circumstances which, if

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Mr. Emerson had pursued his inquiries, might have come to his knowledge and have resulted in his entertaining a different opinion as to the solvency of the mortgagors, the question is whether, in the year 1899, there was anything which imposed on Mr. Emerson such an obligation to make those inquiries, as that his neglect so to do ought to be treated by this Court as unreasonable. I do not think there was.

I think in one respect this case stands apart from many others in that there was in existence at the time of the advance a valuation of the security made at a comparatively recent period, of which the trustees availed themselves. I do not mean that there may not be other cases where there are prior valuations in existence brought to the notice of the lenders, but the distinguishing feature of the prior valuation in this case lies in this, that it is common ground that it was a valuation honestly made by a most (I might almost say "the most") competent man for the sole purpose of ascertaining the true and accurate value of the property. These are facts which must not be overlooked in determining whether a particular course of conduct was reasonable or not.

In these circumstances, even if I had come to the conclusion that to some extent the loan was in excess of the amount which ought properly to have been lent, I should have said this was a case in which, in respect of all the trustees, I ought to exercise in their relief the discretion vested in me.

Now comes an unfortunate part of the case, the question who is to bear the costs of this litigation. No one can regret more than I do that the costs must fall on one or other of the litigants, both of them, according to my view, equally innocent and equally to be pitied; but, after all, in that state of things where the equities are so equal, it seems to me that the costs must abide the result; and in dismissing the action, as I do, I must dismiss it with costs.

Solicitors: *Griffith & Gardiner, for Bignold, Pollard & Wilson, Norwich; Whites & Co.; C. F. Martelli, for Leathes Prior & Sons, Norwich; R. B. Wheatly, Son & Daniel.*

G. M.

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A settlement made on a second marriage by an undischarged bankrupt of interests acquired after his bankruptcy in trust funds settled before his bankruptcy and still in the hands of the settlement trustees is a transaction for value within the rule laid down in *Cohen* v. *Mitchell,* (1890) 25 Q. B. D. 262, and, if the transaction is bona fide on the part of the second wife, is valid against the trustee in bankruptcy until he intervenes by giving formal notice to the trustees of the settlement or otherwise. The facts that the settlement trustees have actual knowledge of the bankruptcy and that the value given for the transaction is not such as will increase the bankrupt's estate do not prevent the application of the rule.

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Where chattels are settled as heirlooms either by a direct gift to one for life with remainder to another, or by an assurance or bequest upon trust for one for life with remainder to another, the interest of the reversioner in the chattels, whether legal or equitable, is a "chose in action" within the meaning of the exception in s. 4 of the Bills of Sale Act, 1878. Therefore a mortgage by the reversioner of his legal or equitable reversion in the chattels is exempt from the operation of the Bills of Sale Acts and does not require registration under those Acts.

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A member of a building society mortgaged leaseholds to the society to secure an advance of 400*l.* on her shares repayable with interest by monthly instalments extending over ten years. The rules of the society provided that

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when the claims of the society upon any mortgaged property had been satisfied the statutory receipt should be indorsed upon the mortgage at the expense of the mortgagor. The deed conveyed the property to the society upon trust to permit the mortgagor to receive the rents until default in payment of any instalment and, upon default, to enter into possession of the rents and to apply the same in payment of all sums due from the mortgagor and to pay the balance (if any) to the mortgagor: the deed also contained a trust for sale.

In 1887 the mortgagor made default and the society went into possession and managed the property, treating it in their books as a mortgage transaction, and by 1902 all sums payable under the deed were satisfied. After 1902 the society entered the rents to a "suspense account" in their ledger until 1910, when the society was ordered to be wound up: the same year the lease of the property expired. In the winding-up the mortgagor claimed the surplus rents standing to the credit of the suspense account on the ground that the society were trustees thereof for her and that the Statute of Limitations did not apply:—

Held, following *In re Alison*, (1879) 11 Ch. D. 284, that the deed though in form a trust was in substance a mortgage, that the Statute of Limitations commenced to run when the society took possession in 1887, and therefore that the claim of the mortgagor was barred.

Held, also, that the annual statutory accounts which the society published pursuant to s. 40 of the Building Societies Act, 1874, and in which the leaseholds were included in the properties of which the society were in possession as mortgagees, were not acknowledgments of the mortgagor's title within s. 7 of the Real Property Limitation Act, 1874, so as to preclude the operation of that section.

Wilson v. *Walton and Kirkdale Permanent Building Society*, (1903) 19 Times L. R. 408, followed on this point. *In re* METROPOLIS AND COUNTIES PERMANENT INVESTMENT BUILDING SOCIETY. GATFIELD'S CASE - **Neville J. 698**

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—— *Hare* v. *Putney Overseers,* (1881) 7 Q. B. D. 223, 233.
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—— *Harris* v. *Harris* (No. 2), (1861) 29 Beav. 110.
Explained by Warrington J. *In re* ROBINSON. MCLAREN *v.* PUBLIC TRUSTEE – – – [1911] **1 Ch. 502**

—— *Hernando, In re* - (1884) 27 Ch. D. 284
Applied by Swinfen Eady J. *In re* MACKENZIE. MACKENZIE *v.* EDWARDS-MOSS – – – [1911] **1 Ch. 578**

—— *Holford, In re* [1894] 3 Ch. 30
Followed by Eve J. *In re* WILLIAMS' SETTLEMENT. WILLIAMS *v.* WILLIAMS
[1911] **1 Ch. 441**

—— *Hoyles, In re. Row* v. *Jagg,* [1910] 2 Ch. 333.
Affirmed by C. A. – [1911] **1 Ch. 179**

—— *Hudson* v. *Carmichael,* (1854) Kay, 613, 620.
Dictum of Wood V.-C. in, followed by Warrington J. HALL *v.* HALL
[1911] **1 Ch. 487**

—— *Jervis* v. *Wolferstan,* (1874) L. R. 18 Eq. 18, 24.
Applied by Swinfen Eady J. MATTHEWS *v.* RUGGLES-BRISE
[1911] **1 Ch. 194**

CASES—*continued.*

—— *Kavanagh* v. *Workingman's Benefit Building Society*, [1896] 1 I. R. 56.
Discussed and disapproved by C. A. BATH *v.* STANDARD LAND COMPANY [1911] 1 Ch. 618

—— *Llanover (Baroness), In re*, [1907] 1 Ch. 635.
Distinguished, and the *semble* in the head-note discussed, by Eve J. *In re* SUMNER'S SETTLED ESTATES [1911] 1 Ch. 315

—— *Mansell* v. *Valley Printing Co.*, [1908] 2 Ch. 441.
Applied by Parker J. BOWDEN BROTHERS *v.* AMALGAMATED PICTORIALS, LIMITED – [1911] 1 Ch. 386

—— *Mégret, In re* - [1901] 1 Ch. 547, 549
Applied by Swinfen Eady J. *In re* MACKENZIE. MACKENZIE *v.* EDWARDS-MOSS – – – [1911] 1 Ch. 578

—— *Metropolitan Ry. Co.* v. *Fowler*, [1893] A. C. 416, 427.
Applied by Swinfen Eady J. CENTRAL LONDON RAILWAY COMPANY *v.* CITY OF LONDON LAND TAX COMMISSIONERS – – – [1911] 1 Ch. 467

—— *Moody, In re* - - [1895] 1 Ch. 101
Applied by Eve J. *In re* ABRAHAMS [1911] 1 Ch. 108

—— *Mosely* v. *Koffyfontein Mines, Ld.*, [1910] 2 Ch. 382.
Reversed by C. A. – [1911] 1 Ch. 73

—— *Newton, Chambers & Co.* v. *Hall*, [1907] 2 K. B. 446.
Applied by Swinfen Eady J. CENTRAL LONDON RAILWAY COMPANY *v.* CITY OF LONDON LAND TAX COMMISSIONERS – – – [1911] 1 Ch. 467

—— *Noble* v. *Cass* - (1828) 2 Sim. 343
Explained and distinguished by Swinfen Eady J. *In re* LACON'S SETTLEMENT – – – [1911] 1 Ch. 351

—— *Nutter* v. *Accrington Local Board of Health*, (1878) 4 Q. B. D. 379.
Explained and distinguished by Warrington J. *In re* EARL OF STAMFORD AND WARRINGTON. PAYNE *v.* GREY [1911] 1 Ch. 648

—— *Osmond* v. *Mutual Cycle and Manufacturing Supply Co.*, [1899] 2 Q. B. 488.
Distinguished by Parker J. JONES *v.* LLANRWST URBAN COUNCIL [1911] 1 Ch. 393

—— *Paget* v. *Paget*, [1898] 1 Ch. 474, 475
Dictum of Wood V.-C. in *Hudson* v. *Carmichael*, (1854) Kay, 613, 620, has not been affected by the dicta of Lindley M.R. in. Per Warrington J. HALL *v.* HALL – [1911] 1 Ch. 487

—— *Porte* v. *Williams*, [1910] W. N. 233; [1911] 1 Ch. 188.
Followed by Warrington J. *In re* HUDSON – – – [1911] 1 Ch. 206

CASES—*continued.*

—— *Rigby* v. *Connol*, (1880) 14 Ch. D. 482
Distinguished by C. A. OSBORNE *v.* AMALGAMATED SOCIETY OF RAILWAY SERVANTS – – [1911] 1 Ch. 540

—— *Rishton* v. *Grissell*, (1868) L. R. 5 Eq. 326.
Distinguished by C. A. *In re* SPANISH PROSPECTING COMPANY [1911] 1 Ch. 92

—— *Robinson, In re. Clarkson* v. *Robinson*, [1910] 2 Ch. 571.
Affirmed by C. A. – [1911] 1 Ch. 230

—— *Ruthin and Cerrig-y-Druidion Railway Act, In re*, (1886) 32 Ch. D. 438.
Applied by C. A. *In re* SOUTHPORT AND LYTHAM TRAMROAD ACT, 1900. *Ex parte* HESKETH [1911] 1 Ch. 120

—— *Rylands* v. *Fletcher*, (1868) L. R. 3 H. L. 330.
Principle of, applied by Parker J. JONES *v.* LLANRWST URBAN COUNCIL [1911] 1 Ch. 393

—— *Sanitary Carbon Co., In re*, [1877] W. N. 223.
Distinguished by Warrington J. EAST *v.* BENNETT BROTHERS, LIMITED [1911] 1 Ch. 163

—— *Sharp* v. *Dawes*, (1876) 2 Q. B. D. 26
Distinguished by Warrington J. EAST *v.* BENNETT BROTHERS, LIMITED [1911] 1 Ch. 163

—— *Smith* v. *Smith* - (1861) 3 Giff. 263
Explained and distinguished by C. A. TURNER *v.* TURNER – [1911] 1 Ch. 716

—— *Taylor* v. *Meads*, (1865) 4 D. J. & S. 597, 604.
Applied by Swinfen Eady J. *In re* MACKENZIE. MACKENZIE *v.* EDWARDS-MOSS – – – [1911] 1 Ch. 578

—— *Towers* v. *African Tug Co.*, [1904] 1 Ch. 558.
Distinguished by C. A. MOSELY *v.* KOFFYFONTEIN MINES, LIMITED [1911] 1 Ch. 73

—— *Tritton, In re* - (1889) 61 L. T. 301
Followed by Neville J. *In re* THYNNE – – – [1911] 1 Ch. 282

—— *Turvin* v. *Newcome*, (1856) 3 K. & J. 16.
Followed by Warrington J. *In re* EARL OF STAMFORD AND WARRINGTON [1911] 1 Ch. 255

—— *Vauxhall Bridge Co.* v. *Sawyer*, (1851) 6 Ex. 504.
Distinguished by Swinfen Eady J. CENTRAL LONDON RAILWAY COMPANY *v.* CITY OF LONDON LAND TAX COMMISSIONERS – – – [1911] 1 Ch. 467

—— *Walker* v. *Jones*, (1866) L. R. 1 P. C. 50, 61.
Followed by Warrington J. ROURKE *v.* ROBINSON – – [1911] 1 Ch. 480

CASES—*continued.*

—— *Waring* v. *Ward,* (1802) 7 Ves. 332, 336
Followed by Eve J. MILLS *v.* UNITED COUNTIES BANK, LIMITED
[1911] 1 Ch. 669

—— *Westminster Corporation* v. *Johnson,* [1904] 2 K. B. 737, 746, 750.
Applied by Swinfen Eady J. CENTRAL LONDON RAILWAY COMPANY *v.* CITY OF LONDON LAND TAX COMMISSIONERS – – – [1911] 1 Ch. 467

—— *Westminster Corporation* v. *St. George, Hanover Square (Rector and Churchwardens),* [1908] 2 Ch. 600; [1909] 1 Ch. 592; [1910] A. C. 225.
See In re HYDE PARK PLACE CHARITY
[1911] 1 Ch. 678

—— *Williams* v. *Hathaway,* (1877) 6 Ch. D. 544.
Distinguished by Warrington J. WATLING *v.* LEWIS – [1911] 1 Ch. 414

—— *Wilson* v. *Walton and Kirkdale Permanent Building Society,* (1903) 19 Times L. R. 408.
Followed on one point by Neville J. *In re* METROPOLIS AND COUNTIES PERMANENT INVESTMENT BUILDING SOCIETY – – – [1911] 1 Ch. 698

—— *Wimbledon Olympia, Ld., In re,* [1910] 1 Ch. 630.
Followed by Swinfen Eady J. *In re* SOUTH OF ENGLAND NATURAL GAS AND PETROLEUM COMPANY
[1911] 1 Ch. 573

—— *Wolstanton United Urban Council* v. *Tunstall Urban Council,* [1910] 2 Ch. 347.
On appeal from a decision of Neville J. An order agreed to.
C. A. [1911] 1 Ch. 229

—— *Wood, In re* – – [1894] 3 Ch. 381
Applied by Eve J. *In re* BEWICK
[1911] 1 Ch. 116

CERTIFICATE—that shares were fully paid—Estoppel—Allotment to partnership—Partner one of directors who signed certificate—Notice – – – 86
See COMPANY. 8.

CHARITY — *Scheme — Leave to intervene and attend Proceedings—Practice—Time of Intervention.*

In 1762 land was bought for a burial ground for the inhabitants of the parish of St. George, Hanover Square. Building leases were granted of the unconsecrated part of land, and, as they fell in, fresh leases were granted, so that the property was now worth over 2000*l.* a year. The Council of the city of Westminster brought an action against the rector and churchwardens of the parish for a declaration that the premises were not Church property, and that the power of the vestry of the parish to administer the income thereof had been transferred to the council by the

CHARITY—*continued.*

London Government Act, 1899. The House of Lords decided that the land was Church property, and that the power to direct the application of the income did not pass to the council; but their Lordships expressly refrained from deciding for what purposes the income was applicable. The case is reported; *Westminster Corporation* v. *Rector and Churchwardens of St. George, Hanover Square,* [1908] 2 Ch. 600, [1909] 1 Ch. 592, and [1910] A. C. 225.

The rector and churchwardens took out a summons for the establishment of a scheme for the administration of the trusts of the charity, to which the Attorney-General was the only respondent. The council applied by summons for liberty to intervene and attend the proceedings for settlement of a scheme:—

Held, by Warrington J. and the Court of Appeal, that the application was premature and ought not to be acceded to. *In re* HYDE PARK PLACE CHARITY – – – C. A. 678

—— Mortmain—Charitable bequest—Colonial mortgages—Movables or immovables—Adoption of English law by Colony
See CONFLICT OF LAWS. 2. 179

CHOSE IN ACTION — Bill of sale — "Personal chattels"—Settled heirlooms—Mortgage of heirlooms by reversioner—Non-registration – – – 282
See BILL OF SALE.

CLASS — Remoteness — Gift of proceeds to unascertained class – – – 116
See WILL. 2.

—— Will—Collaterals—Death before testator
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COLLATERALS — Will — Class — Death before testator – – – – – 358
See WILL. 1.

COLONY — Mortmain — Charitable bequest — Colonial mortgages—Movables or immovables—Adoption of English law by Colony – – – – 179
See CONFLICT OF LAWS. 2.

COMMISSION — Limited company appointed agent—Profit costs—Salary and commission – – – – – 618
See PRINCIPAL AND AGENT.

COMPANY — *Contract of Service — Cumulative Salary payable out of "Profits"—Winding-up—Payment of Creditors and Shareholders in full—Surplus in Hands of Liquidator—Undrawn Profits—Arrears of Salary.*

P. and V. agreed to serve a company at a fixed salary which they were not to be entitled to draw "except only out of profits (if any) arising from the business of the company which may from time to time be available for such purpose, but such salary shall nevertheless be cumulative, and accordingly any arrears thereof shall be payable out of any succeeding profits as aforesaid." The business of the

company included the purchase and sale of shares. In the course of and for the purposes of its business the company acquired shares and debentures in another company. The shares were sold for cash and the proceeds brought into profit and loss account. The debentures were included in the yearly balance-sheets of the company as an unvalued asset. In the voluntary liquidation of the company the whole of the assets were sold, the debentures realizing 3072*l.*; all the creditors, except P. and V., to whom about 8000*l.* in respect of arrears of salary was due, were paid in full, and all the subscribed capital was returned to the shareholders, leaving a surplus of 3328*l.* in the hands of the liquidator:—

Held, reversing the decision of Swinfen Eady J., that the surplus in the hands of the liquidator ought to be treated as undrawn profits arising from the business of the company out of which P. and V. were entitled to be paid.

The meaning of the word "profits" explained by Fletcher Moulton L.J.

Frames v. *Bultfontein Mining Co.*, [1891] 1 Ch. 140, and *Rishton* v. *Grissell*, (1868) L. R. 5 Eq. 326, distinguished. *In re* SPANISH PROSPECTING COMPANY, LIMITED – – **C. A. 92**

2. —— *Debentures—Guarantee—Insurance—Suretyship—Release of Guarantor—"Arrangement or Compromise"—Majority of Debenture-holders binding Minority.*

The plaintiff held debentures of the defendant company forming part of an issue secured by a trust deed which provided that the debentures should be guaranteed by the Law Guarantee Trust and Accident Society, Limited, which was to be the trustee for the debenture-holders. By this deed a sinking fund for the redemption of the debentures was to be established; and the company were to pay to the society a remuneration for services as trustee and 10*s.* per cent. premium on the amount of the outstanding debentures. A general meeting of the debenture-holders was to have power by extraordinary resolution to assent to any arrangement or compromise proposed to be made between the company and the debenture-holders, provided that it was one which the Court would have jurisdiction to sanction under the Joint Stock Companies Arrangement Act, 1870, or any statutory modification thereof, if the company were being wound up and the requisite majority at a meeting of the debenture-holders summoned pursuant to that Act had agreed thereto; and an extraordinary resolution duly passed at a general meeting of the debenture-holders was to be binding upon all the debenture-holders, whether present or not present at the meeting, and each of the debenture-holders was to be bound to give effect thereto accordingly. Resolutions were passed in December, 1909, for the voluntary winding-up of the society, and the winding-up was now being continued under supervision.

At meetings duly convened and held in

March, 1910, resolutions were passed by the requisite majority of the debenture-holders of the company releasing the society from the guarantee; increasing the interest on the debenture debt; appointing new trustees of the deed; and discontinuing the sinking fund.

A draft supplemental trust deed was prepared which provided that each debenture-holder should forthwith surrender his debentures to the company and accept new debentures carrying the higher rate of interest but no guarantee by the society. The plaintiff did not attend the meetings nor assent to the resolutions, and he declined to surrender his debentures or give up the guarantee. He brought this action against the company, the society, and the new trustees for a declaration that the resolutions were not binding on him, and for an injunction to restrain the defendants from acting on them:—

Held, that the guarantee was in the nature of a policy of insurance as well as a contract of suretyship and was not destroyed by the disappearance of the debt; that the resolutions were an arrangement or compromise between the company and the debenture-holders which the debenture-holders could pass and the Court could sanction although the position of a third party was thereby affected; and that the whole scheme of the resolutions was valid and binding on the plaintiff. SHAW *v.* ROYCE, LIMITED – – **Warrington J. 138**

3. —— *Directors—Power to increase Capital—Creation and Issue of Shares—Memorandum and Articles of Association—Alteration by Special Resolution—Validity — Shareholder—Acquiescence—Right to maintain Action.*

The defendant company was incorporated in 1893 under articles of association which provided (article 53) that "the company in general meeting" might increase its capital by the creation of new shares. By a special resolution passed and confirmed in 1895, article 53 was altered so that the power of increasing the capital should no longer be exercised by the company in general meeting, but by "resolution of the directors." By article 59 any new shares from time to time to be created might from time to time be issued with such right of preference and generally on such terms as the company might from time to time by resolution of a general meeting declare. In 1903 the directors passed a resolution increasing the capital of the company. The plaintiff, a shareholder and former director of the company, was a party to the resolutions altering the articles and authorizing the issue of new capital. Having ceased to be a director, he brought an action, on behalf of himself and all other shareholders, to have it declared that the resolutions altering article 53 and increasing the capital were ultra vires, and that the directors had no power to issue new shares:—

Held by Eve J., [1910] 2 Ch. 382, that the company was acting within its powers in modifying the articles so as to give the directors power to increase its capital.

On appeal the respondents objected that the plaintiff, having been a party to the resolutions in question, was not entitled to maintain the action :—

Held, that, inasmuch as the plaintiff was seeking to restrain proposed future illegal proceedings by the company, he was entitled to maintain the action.

Towers v. *African Tug Co.*, [1904] 1 Ch. 558, distinguished.

Held, further, on the construction of the articles, that, assuming the power of the directors to create new shares, they had no power in the absence of a resolution by the company to issue them. MOSELY *v.* KOFFYFONTEIN MINES, LIMITED - - - - - **C. A. 73**

4. —— *Directors — Qualification Shares — Shares held in Trust for Promoter—Misfeasance—Damages.*

Directors who accept and hold their qualification shares in trust for and at the will of the promoter, to whom they hand blank transfers, are guilty of misfeasance, and the measure of damages is the highest value of the shares during their holding.

Eden v. *Ridsdales Railway Lamp and Lighting Co.*, (1889) 23 Q. B. D. 368, and *Archer's Case,* [1892] 1 Ch. 322, 337, 341, applied. *In re* LONDON AND SOUTH WESTERN CANAL, LIMITED - - **Swinfen Eady J. 346**

5. —— *Memorandum of Association — Increase of Capital—Alteration of Rights of Preference Shareholders—Sanction of Preference Shareholders by Resolution at separate Meeting—All Preference Shares held by one Person —"Meeting."*

A company was incorporated with a capital divided into preference and ordinary shares. The memorandum of association empowered the company to increase its capital, but provided that no new shares should be issued so as to rank equally with or in priority to the preference shares, unless such issue was sanctioned by an extraordinary resolution of the holders of the preference shares present at a separate "meeting" of such holders specially summoned for the purpose of considering the question. The articles of association contained a similar provision.

Shortly after the incorporation of the company meetings were held at which a special resolution was passed and confirmed increasing its capital by a fresh issue of preference shares. At that time B. was the holder of all the original preference shares. He presided at the first meeting, moved the resolution for the issue of the new preference shares, and signed a document in the minute-book recording his assent as the holder of all the original preference shares to the issue of the new preference shares. In pursuance of this resolution and in reliance on B.'s assent the new preference shares were subsequently issued :—

Held, that, there being nothing in the constitution of the company to prevent the whole of the original preference shares being held by one shareholder, the word "meeting" in the memorandum and articles must be taken to have been used not in its strict sense, but as applicable to the case of a single shareholder.

Held, therefore, that there had been a sufficient compliance with the requirements of the memorandum and articles, and that the new preference shares had been validly issued.

Sharp v. *Dawes*, (1876) 2 Q. B. D. 26, and *In re Sanitary Carbon Co.*, [1877] W. N. 223, distinguished. EAST *v.* BENNETT BROTHERS, LIMITED - - - **Warrington J. 163**

6. —— *Prospectus—Offering Shares to the Public—Facts to be stated—Previous Offer of Shares — Remedy for Omission — Companies (Consolidation) Act,* 1908 (8 *Edw.* 7, *c.* 69), *ss.* 81, 285.

In February, 1910, a prospectus was issued on behalf of a company headed "For private circulation only," but also containing a statement that it had been filed with the Registrar of Joint Stock Companies. It was stated that this prospectus was distributed by the promoter only to shareholders in certain gas companies in which he was interested, and not more than 3000 copies were sent out. In April, 1910, a second prospectus was issued which contained no statement of the first offer of shares. B. applied for and was allotted shares on the terms of the second prospectus. He died soon afterwards. His executors moved to rectify the register by removing his name on the ground that there was a breach of s. 81 of the Companies (Consolidation) Act, 1908, in not stating the offer of shares contained in the first prospectus and the amount subscribed :—

Held, on the evidence, that the circulation of the first prospectus was an offer of shares to the public within the meaning of the Act of 1908. Consequently the second prospectus was a "subsequent offer" within s. 81 of the same Act and the first offer ought to have been stated.

But *held,* that the remedy of the allottee was in damages against the persons responsible for the prospectus and not by rescission.

In re Wimbledon Olympia, Ld., [1910] 1 Ch. 630, followed. *In re* SOUTH OF ENGLAND NATURAL GAS AND PETROLEUM COMPANY, LIMITED - - - **Swinfen Eady J. 573**

7. —— *Winding-up—Articles of Association —Meaning of "Surplus Assets."*

The capital of a company consisted of 5000 shares of 1*l.* each, called A shares, and 5000 shares of 1*s.* each, called B shares. The articles of association provided that in the event of a winding-up the surplus assets should be divided into two moieties, one of which should belong to and be distributed amongst the holders of the A shares, and the other amongst the holders of the B shares, and that the profits available for distribution should be divided in the same way. All the shares had been paid in full. The company was in voluntary liquidation. The liquidator had paid the debts of the company and the

COMPANY—*continued.*

costs of winding-up and had a balance in his hands. He took out this summons for the determination of the question how the balance ought to be divided between the two classes of shareholders :—

Held, that surplus assets in this case meant the surplus after payment of outside liabilities and repayment to the shareholders of capital paid up.

Semble : In every case where surplus assets are directed to be divided between two classes of shares without reference to the nominal amounts of the shares or the amounts paid up, there is a presumption that surplus assets means a surplus after payment of outside liabilities and repayment of capital, and it needs clear and express words to give the phrase the meaning of surplus after payment of debts and costs only. *In re* RAMEL SYNDICATE, LIMITED - - - **Neville J. 749**

8. —— *Winding-up — Contributory — Certificate that Shares were fully paid — Estoppel — Allotment to Partnership — Partner one of Directors who signed Certificate — Notice.*

C. K. & Co., a partnership firm, agreed to sell a ship to a company for 1500*l.* and to take 1000*l.* in fully-paid shares. The transaction was carried out by the firm mortgaging the ship for 1000*l.*, paying the money to the company, and then transferring the ship to the company subject to the mortgage at the price of 500*l.* The 1000*l.* was paid before any shares had been allotted. E., who was a promoter of the company, applied the money, without the knowledge or authority of the firm, in paying 5*s.* per share payable on application on 4000 shares for which he had applied. These shares, numbered 791 to 4790, were allotted to him and entered in the register with only 5*s.* paid. Subsequently K., one of the partners, became a director of the company ; 1000 of E.'s shares were transferred to the firm. A certificate was issued by the company to the firm that these shares, numbered 891 to 1890, were fully paid. The certificate was signed by two directors, of whom K. was one. The company was being wound up compulsorily, and the liquidator put the firm on the list of contributories for 15*s.* on each of 1000 shares :—

Held, that K. had no actual knowledge of the transaction and had not acted in collusion with E. ; and in that state of his knowledge the fact that he was a director and signed the certificate did not affect either him or his firm with notice of the facts or prevent them from relying on the estoppel created against the company by the certificate. *In re* COASTERS, LIMITED **Neville J. 86**

9. —— *Winding-up — Misfeasance — Directors' Gross Negligence — Duty of Directors — Misstatements in Prospectus — Directors deceived — Company formed to enter into specified Contract — Clause in Articles exempting Directors from Liability.*

The B. Company was incorporated on January 31, 1906, with the object of purchasing certain estates in Brazil, and for that purpose entering with or without modification into a specified contract with a syndicate, which had been already prepared. On the same day the directors issued a prospectus inviting subscriptions for shares which contained statements, specially as to area of the estate and number of rubber trees thereon, which were untrue. These statements were taken from a report furnished to the directors by M., a member of a firm who had obtained an option to purchase the estate and had sold to the syndicate at an increased price. The report was fraudulent, but the directors believed it to be an honest report and adopted it without inquiry. Subsequently, before the whole of the purchase-money was paid, the directors received information from a manager whom they sent out to Brazil that the statements contained in the report and prospectus were untrue, but notwithstanding this they went on with and completed the purchase. The articles of association contained a provision that no director should be liable for any loss or damage occasioned by any error of judgment or oversight on his part or for any other loss, damage, or misfortune whatever which should happen in the execution of the duties of his office or in relation thereto, unless the same happened through his own dishonesty. The company having been ordered to be wound up compulsorily, the liquidator took out this summons claiming damages against the directors for misfeasance consisting in gross negligence in entering into the contract without proper examination and in not repudiating it when they discovered the errors in the report :—

Held, that the conduct of the directors did not amount to gross negligence. *Semble* even if it had been gross negligence the directors were protected by the provision in the articles.

In re BRAZILIAN RUBBER PLANTATIONS AND ESTATES, LIMITED - - - **Neville J. 425**

—— Agent; Limited company appointed — Profit costs and commission - **618**
See PRINCIPAL AND AGENT.

—— Limited partnership — Winding-up — Just and equitable - - - - **342**
See PARTNERSHIP. 1.

COMPENSATION — Tramway company — Abandonment of undertaking — Compensation to landowner - - - **120**
See TRAMWAYS. 2.

COMPROMISE — Deed of — Power of appointment — Fraud on power — Appointment void or voidable - - - - **18**
See POWER OF APPOINTMENT. 2.

CONDITION — Appointment to object of power — Condition to pay appointor's debts — Purpose foreign to power — Fraud on power - - - - - **37**
See POWER OF APPOINTMENT. 1.

CONFLICT OF LAWS—*Domicil—Matrimonial Domicil — Incapacity of Wife to acquire Separate Domicil — Scottish Husband—English Wife—Marriage Contract—Proper Law—Intention—English Settlement—Separate Use—After-acquired Property Clause — Life Interests—Restraint on Anticipation imposed by Donors—Scottish Law—Marriage Contract before* 1881—*Wife's Savings of Separate Income under Contract—Implied Testamentary Power—Pars contractus—Subsequent Creation of Statutory Jus Relicti and Legitim—Effect on Testamentary Power — Married Women's Property (Scotland) Act*, 1881 (44 & 45 *Vict. c.* 21), *ss.* 6, 7, 8.

In the absence of a decree of judicial separation or its equivalent—divorce a mensa et thoro—a wife cannot obtain a separate domicil from that of her husband, unless possibly in the exceptional cases referred to by Lord Cranworth in *Dolphin* v. *Robins*, (1859) 7 H. L. C. 418.

Dolphin v. *Robins*, 7 H. L. C. 390, 417, 418, 420, 423, explained and applied.

In 1877 a domiciled Scotsman married a domiciled Englishwoman.

By a marriage settlement in Scottish form made between the husband and the wife with her father's consent, funds belonging to the husband were settled for the life-rent use of the wife if she survived him with remainder to the children of the marriage as therein expressed, the provisions to be in bar of claims to jus relictæ and legitim out of the husband's movable estate.

By a contemporaneous settlement in English form made between the wife's father, the wife, the husband, and the trustees, funds belonging to the wife were settled in trust for the wife for life for her separate use without power of anticipation with remainder to the husband for life until bankruptcy or alienation, and subject thereto on the usual trusts for the issue of the marriage, with an ultimate trust in default of issue for the wife if she survived the husband, or her statutory next of kin if she predeceased him.

The after-acquired property clause included life interests. The income of these life interests was to be paid to the wife for her separate use without power of anticipation. They were excluded from the trust for conversion and could only be sold with her consent.

Under the wills of her mother and brother, who died after the passing of the Married Women's Property (Scotland) Act, 1881, the wife became entitled to life interests in movables for her separate use without power of anticipation.

The wife died on August 19, 1909, domiciled in Scotland. She was possessed of considerable free movable estate representing savings of income of movable property settled to her separate use. By her will she disposed of this property to the exclusion of her husband and child.

The husband and child claimed the jus relicti and legitim created by the Act of 1881, ss. 6, 7. The executors, failing to establish an English domicil, relied on s. 8, which provides that the Act shall not affect any contracts made by married persons before or during marriage :—

Held, that the parties to the marriage contract intended the Scottish settlement to be governed by Scottish law and the English settlement by English law.

In re Hernando, (1884) 27 Ch. D. 284 ; *In re Mégret*, [1901] 1 Ch. 547, 549 ; *Chamberlain* v. *Napier*, (1880) 15 Ch. D. 614, 631 ; *Hamlyn & Co.* v. *Talisker Distillery*, [1894] A. C. 202 ; *In re Fitzgerald*, [1904] 1 Ch. 573, 587 ; and *British South Africa Co.* v. *De Beers Consolidated Mines, Ld.*, [1910] 1 Ch. 354, 381—383 ; 2 Ch. 502, applied.

Held, therefore, that the wife could dispose by will of the savings of income of the separate property comprised in the English settlement.

Taylor v. *Meads*, (1865) 4 D. J. & S. 597, 604 ; *Gore* v. *Knight*, (1705) 2 Vern. 535 ; and *Barrack* v. *M'Culloch*, (1856) 3 K. & J. 110, applied.

Held, also, that the after-acquired life interests were caught by the English settlement, notwithstanding the restraint on anticipation imposed by the donors.

Held, also, that even if the English settlement of 1877 was governed by Scottish law, the complete power of testamentary disposition thereby given to the wife (according to the Scottish law of that date) over the savings of separate income therein comprised was a pars contractus thereof, which, having regard to s. 8 of the Act of 1881, was not affected by the jus relicti and legitim subsequently created by that Act. *In re* MACKENZIE. MACKENZIE *v.* EDWARDS-MOSS

Swinfen Eady J. 578

2. —— *Mortmain — Charitable Bequest — Colonial Mortgages—Movables or Immovables—Lex Domicilii—Lex rei sitæ—Adoption of English Law by Colony—Mortmain Act*, 1736 (9 *Geo.* 2, *c.* 36).

A mortgage on land is an immovable.

Therefore where a domiciled Englishman, who died before the repeal of the Mortmain Act, 1736, by his will gave to charity his residuary estate, which included mortgages on land in Ontario, and at the date of his death the law was the same in Ontario as in England :—

Held, that the gift of the mortgages was void.

Per Farwell L.J.: The division of property into movable and immovable is only called into operation when the English Courts have to determine rights between a domiciled Englishman and a person domiciled in a country which does not adopt the English division of property into real and personal ; it does not apply where the law is the same in the two countries.

Decision of Swinfen Eady J., [1910] 2 Ch. 333, affirmed. *In re* HOYLES. ROW *v.* JAGG - - - - - - **C. A. 179**

CONSENT ORDER—Receiver and manager, Consent order appointing — Partnership

CONSENT ORDER—*continued.*

action — Insufficiency of assets — Indemnity—Claim against partners personally – – – – – 155
See PARTNERSHIP. 2.

CONTINGENCY—Infant—Contingent legacy by parent — Interest — Maintenance — Share of residue – – – 108
See WILL. 3.

CONTINGENT INTEREST—After-acquired property, Wife's covenant to settle—Wife's contingent interest — Vesting in possession during coverture — Change of interest — Operation of covenant – – – – – 441
See SETTLEMENT.

CONTINGENT LEGACY—Will—Part of specific legacy applied in payment of debt—Marshalling — Compensation out of residuary estate—Legacy contingent on legatee's attaining twenty-one
See WILL. 7. 277

CONTRACT—Covenants.
See under COVENANT.

CONTRACT OF SERVICE—Cumulative salary payable out of "profits"—Undrawn profits—Arrears of salary – 92
See COMPANY. 1.

—— Solicitor—Agreement of service—Restrictive undertaking—Injunction – 326
See SOLICITOR.

CONTRIBUTORY — Company — Winding-up — Estoppel—Allotment to partnership
See COMPANY. 8. 86

COPYRIGHT — *Photographs — Supply for illustrating Magazine — Publication after Agreement terminated—Common Law Rights—Injunction—Fine Arts Copyright Act,* 1862 (25 & 26 *Vict. c.* 68), *ss.* 1, 4, 6, 11.

The plaintiffs, the proprietors of photographs, the copyright in some only of which was registered, from time to time supplied the defendants, the proprietors of weekly periodicals, with photographs for reproduction as illustrations in the periodicals at certain charges for each user. The plaintiffs having put an end to their arrangement with the defendants, the latter continued the publication of photographs of the former in which the copyright had been registered, and claimed the right to reproduce photographs of the plaintiffs in respect of which there was no registered copyright:—

Held, that the plaintiffs' action had the effect of revoking all open offers, and that the defendants could not subsequently, without the licence of the plaintiffs, use, whether for the first time or not, photographs already supplied by the plaintiffs; and that the plaintiffs, although they had not registered the copyright in some of the photographs, were entitled to an injunction to restrain the infringement not only of their statutory copyright, but also of their common law rights.

COPYRIGHT—*continued.*

Mansell v. *Valley Printing Co.*, [1908] 2 Ch. 441, applied. BOWDEN BROTHERS *v.* AMALGAMATED PICTORIALS, LIMITED.
Parker J. 386

CORPUS—Income or—Annuity expressed to be payable out of income—Gift over "subject thereto" – – – 1
See ANNUITY.

COSTS — Administration action — Costs of inquiries relating to particular shares
See PRACTICE. 214

—— Company appointed agent—Profit costs —Salary and commission – – 618
See PRINCIPAL AND AGENT.

—— Mortgage — Redemption, Action for — Costs of action – – – 480
See MORTGAGE. 3.

—— Settled estates—Costs of unsuccessful litigation — Whether payable out of capital moneys – – – 370
See SETTLED LAND. 2.

—— Shorthand notes—Joint note—Costs in the cause – – – – – 393
See RIVER.

—— Trustee, Public—Audit of trust accounts —Appeal from direction as to costs
See TRUSTEE. 6. 532

COVENANT — *Contract — Parties — Covenant by Covenantor with himself and others—Joint Right to enforce Obligation—Lease—Assignee —Validity.*

The testator directed that his trustees should, if requested to do so, give a lease of a freehold house forming part of his estate to his son C. R. at a rent to be fixed by arbitration, and that the lease should contain a lessee's covenant to repair and other covenants usual in a London repairing lease. C. R. was himself one of the trustees; he exercised his option, and a lease was executed between C. R. and his co-trustees as lessors and C. R. as lessee whereby the trustees let the house to C. R. for twenty-one years and he covenanted for himself, his executors, administrators, and assigns, with the lessors, their heirs and assigns, amongst other things, to keep the property in repair and not to assign without the lessor's consent. C. R. entered into possession of and carried on business on the premises till he sold the business to a company and assigned the term to them. They issued debentures secured by a trust deed which included the lease. The lessors brought this action against the trustees of the debenture trust deed for a declaration that the lease was binding on the defendants and that they held the premises subject to the lessee's covenants. The defendants, who had never been in possession, insisted that, by reason of the facts that the covenantor was himself one of the covenantees and that the covenants were joint and not joint and several, they were void and created no obligation by which the defendants were bound:—

Held, that there was no ground for rectification or for holding that the defendants

COVENANT—*continued.*

ought to be treated as tenants from year to year; that the lease was not void in law, but the covenants were by one person with himself and others jointly and (following *Ellis* v. *Kerr*, [1910] 1 Ch. 529) were void; and that there was therefore no covenant which could run with the land and impose any personal liability on the defendants. NAPIER *v.* WILLIAMS – – – **Warrington J. 361**

2. ——*Mortgage by Partners of Real Estate—Deaths of Partners—Conveyance of share of Mortgaged Property by Trustee of one Partner to Trustees of another Partner subject to Mortgage—Covenant by latter "as such trustees, but not so as to create any personal liability on the part of them or either of them" to pay Mortgage Debt and indemnify former—Effect.*

P. and H. formerly carried on business in partnership and as such were entitled as part of their partnership property to certain freehold property which was subject to a mortgage created by them to secure 2000*l.* and interest. After the deaths of P. and H. disputes arose between their respective trustees as to P.'s share in the partnership property, and ultimately a compromise was made in pursuance of one of the terms of which a deed was entered into between the plaintiff, the present trustee of P.'s will, and the defendants, the present trustees of H.'s will. By that deed the plaintiff as trustee granted and released unto the defendants P.'s share in the mortgaged premises subject to the mortgage, and the defendants "as such trustees, but not so as to create any personal liability on the part of them or either of them," thereby jointly and severally covenanted with the plaintiff that they or one of them, their or one of their heirs, executors, administrators, or assigns, would pay the principal sum of 2000*l.* then due in respect of the mortgage and all interest thenceforth to become due thereon, and would keep indemnified the plaintiff and his estate and effects and the estate and effects of P. from all claims and demands on account thereof:—

Held, that the effect of the proviso in the covenant, if valid, would be not merely to limit but to destroy the personal liability on the part of the defendants; that inasmuch as there was a covenant to pay and indemnify, the proviso was repugnant to the covenant and had no effect, and that the defendants were therefore liable under the covenant as if the proviso had not been inserted in it.

Furnivall v. *Coombes*, (1843) 5 Man. & G. 736, followed.

Williams v. *Hathaway*, (1877) 6 Ch. D. 544, distinguished. WATLING *v.* LEWIS **Warrington J. 414**

—— After-acquired property — Wife's covenant to settle — Construction — "Become entitled to any estate or interest"—Assignment of even date by wife – – – – – **441**
See SETTLEMENT. 3.

COVENANT—*continued.*

—— Estate duty — Apportionment — Death of covenantor—Incidence of duty
See REVENUE. 1. **459**

—— Repairing covenants — Breach — Dilapidations — Damages — Lease by life tenant – – – – – **351**
See SETTLED LAND. 1.

CUSTOMS ACT.
See under REVENUE.

DAMAGES—Directors—Qualification shares held in trust for promoter—Misfeasance
See COMPANY. 4. **346**

DEBENTURE-HOLDERS AND DEBENTURES—Company.
See under COMPANY.

DEBT—Debtor legatee—Set-off—Retainer of legacy in satisfaction of debt—Partnership debt – – – **716**
See ADMINISTRATION.

DECEASED WIFE'S SISTER'S MARRIAGE ACT – – – – – – **310**
See HUSBAND AND WIFE.

DEPOSIT—Tramway company—Abandonment of undertaking—Covenant to make embankment—Compensation to landowner – – – – – **120**
See TRAMWAYS. 2.

DIRECTORS—Company.
See under COMPANY.

DOMICIL—Matrimonial domicil—Incapacity of wife to acquire separate domicil—Scottish husband—English wife
See CONFLICT OF LAWS. 1. **578**

—— Mortmain—Charitable bequest—Colonial mortgages—Movables or immovables—Lex domicilii—Lex rei sitæ – **179**
See CONFLICT OF LAWS. 2.

DONATIO MORTIS CAUSA—Estate duty on donation — Will — Direction to pay testamentary expenses — Charge on property – – – – – **206**
See REVENUE. 2.

DUTY—Inland Revenue.
See under REVENUE.

EASEMENT—Light—Quiet enjoyment—Derogation from grant—Staircase overlooking bedroom—Privacy—Comfort—Flats – – – – – **219**
See LANDLORD AND TENANT.

ELDEST SON—Portions—Younger children **708**
See SETTLEMENT. 1.

EMBANKMENT—Covenant to make—Tramway company — Abandonment of undertaking—Compensation to landowner
See TRAMWAYS. 2. **120**

EN VENTRE SA MÈRE — Child — "Devise bequeath and appoint" — Trusts for non-objects of power—Power and interest—Intention – – – **246**
See WILL. 5.

ESTATE DUTY—Inland Revenue.
See under REVENUE.

ESTOPPEL—Certificate that shares were fully paid — Allotment to partnership — Partner one of directors who signed certificate—Notice – – – **86**
See COMPANY. 8.

EVIDENCE — Patent — Amended specification put in evidence – – – **514**
See PATENT. 1.

EXECUTION—Power of appointment.
See under POWER OF APPOINTMENT.

EXPULSION—Trade union—Ultra vires—Expulsion of member—Illegal association – – – – – – **540**
See TRADE UNION.

FIDUCIARY RELATION — *Gift — Influence — Nature of Relation which will make Court set aside Gift — Dual Relation — Son managing Business for Mother—Gift induced by Natural Affection—Independent Advice.*

It is not every fiduciary relation between a donor and donee which will induce a Court of Equity to set aside a gift, but only those special relations which from their nature raise a presumption of undue influence. It is sufficient if an independent adviser sees that the donor understands what he is doing and intends to do it; he need not advise him to do it or not to do it.

Decision of Neville J., [1911] 1 Ch. 174, affirmed, but on wider grounds. *In re* COOMBER. COOMBER *v.* COOMBER – **C. A. 723**

FINANCE ACT.
See under REVENUE.

FINE ARTS COPYRIGHT.
See under COPYRIGHT.

FIXTURES—*Settled Estates—Mansion House—Carvings—Right of Removal as between Executor and Devisee or Heir.*

The executor of a deceased owner in fee has no right to remove from the inheritance more than that which really and properly considered is never fixed to it in a definite way.

By the will of the ninth Earl of C. the H. L. estates, of which he was the absolute owner, were settled to certain uses in strict settlement under which the present Earl was tenant for life with remainder to his issue in tail male, with divers remainders over. The testator also bequeathed certain chattels to go as heirlooms, and gave to the present Earl absolutely all his plate (except such as he had before given to his wife), books, pictures, and other works of art or curiosity (except the heirlooms), china, glass, furniture, carriages, horses, wines, and, generally, all goods, effects, and live and dead stock which at his decease might be in or about his mansion house of H. L. At the death of the testator there were in the mansion house certain ornamental wood carvings by Grinling Gibbons. These carvings were affixed to the walls of various rooms therein by means of nails or pegs driven through them into stiles built into the walls. The testator died in 1887. In 1909 the present Earl sold portions of the settled estates including the mansion house, expressly reserving the carvings. He subsequently removed the carvings from the mansion house and sold a portion of them, claiming to be absolutely entitled to the proceeds of sale thereof. Upon the application by summons of the trustees:—

Held, that the carvings did not pass by the bequest of chattels, but, being fixed in a definite way to the inheritance so as to form part of the house, the proceeds of sale of such as had been sold must be treated as capital money subject to the trusts of the settlement. *In re* LORD CHESTERFIELD'S SETTLED ESTATES – – – **Joyce J. 237**

FLATS—Light—Easement—Quiet enjoyment—Staircase overlooking bedroom—Privacy—Comfort – – – – **219**
See LANDLORD AND TENANT.

FOREIGN PLATE.
See under PLATE.

FORFEITURE—Settled land—Limited owner—Powers of tenant for life—Widow entitled to surplus rents during widowhood—"Forfeiture" – – – **315**
See SETTLED LAND. 4.

FRAUD—Power of appointment.
See under POWER OF APPOINTMENT.

GRANT — Staircase overlooking bedroom — Privacy—Comfort—Flats—Quiet enjoyment—Derogation from grant
See LANDLORD AND TENANT. **219**

GUARANTEE—Insurance—Suretyship—Release of guarantor—"Arrangement or compromise" – – – – – **138**
See COMPANY. 2.

HALL MARK—Plate.
See under PLATE.

HEIRLOOMS—Bill of sale—Mortgage of heirlooms by reversioner—Non-registration – – – – – – **282**
See BILL OF SALE.

HIGHWAY—*Liability to repair ratione tenuræ—Agreement with Local Authority to take over Liability in Perpetuity — Validity — Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 148—*Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *s.* 25—"*Incumbrance*"—*Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 21, *sub-s.* (ii.).

By *s.* 148 of the Public Health Act, 1875, urban authorities were empowered by agreement with any person liable to repair a street

HIGHWAY—*continued.*

or road to take on themselves the maintenance, repair, cleansing or watering of any such street or road on such terms as they and such person might agree on.

By s. 25 of the Local Government Act, 1894, that power was transferred to rural district councils :—

Held, that under s. 148 a rural district council were entitled to agree with a person liable to repair a highway ratione tenuræ to take on themselves in perpetuity in consideration of a money payment the liability for the maintenance and repair of the highway, and that the effect of such agreement would be to effectually free and for ever discharge the land and the owner and occupier thereof from that liability.

Dictum of Cockburn C.J. in *Nutter* v. *Accrington Local Board of Health,* (1878) 4 Q. B. D. 379, explained and distinguished.

Quære, whether a liability to repair a highway ratione tenuræ on settled land is an incumbrance within the meaning of s. 21, sub-s. (ii.), of the Settled Land Act, 1882. *In re* EARL OF STAMFORD AND WARRINGTON. PAYNE *v.* GREY – – **Warrington J. 648**

—— Land tax—Redemption—Land abutting on highway—Exoneration ad medium filum — Presumption against —Subsequent construction of underground railway – – – – – **467**
See LAND TAX.

HOSPITAL—*Local Government—Joint Hospital—Management Expenses—Agreement for Apportionment—Adjustment of Liabilities—Local Government Act,* 1888 (51 *&* 52 *Vict. c.* 41), *s.* 62.

Appeal from a decision of Neville J., [1910] 2 Ch. 347. An order agreed to. WOLSTANTON UNITED URBAN DISTRICT COUNCIL *v.* TUNSTALL URBAN DISTRICT COUNCIL – **C. A. 229**

HUSBAND AND WIFE—*Gift of Income during Widowhood—Subsequent Marriage with Deceased Sister's Husband—Effect of Marriage being validated by Statute—Deceased Wife's Sister's Marriage Act,* 1907 (7 *Edw. 7, c.* 47), *ss.* 1, 2.

A man died in 1902 having by his will given his property upon trust to pay his wife the income thereof while she remained his widow, with a gift over on her death or second marriage. In 1904 she went through the ceremony of marriage with her deceased sister's husband, but this marriage was validated by s. 1 of the Deceased Wife's Sister's Marriage Act, 1907, which was passed and came into operation on August 28, 1907 :—

Held, that the effect of s. 2 of the Act was that the plaintiff was still entitled to receive the income of the testator's property.

Semble, that although the Act renders valid as civil contracts previous marriages with deceased wives' sisters, it does not alter or interfere with any rights of property depending on the previous marriages not being valid. *In re* WHITFIELD. HILL *v.* MATHIE
Parker J. 310

HUSBAND AND WIFE—*continued.*

—— Matrimonial domicil—Incapacity of wife to acquire separate domicil—Scottish husband—English wife – – **578**
See CONFLICT OF LAWS. 1.

—— Mortgage by husband and wife of wife's property — Payment of mortgage money to husband and wife — Presumption — Exoneration of wife's property – – – – – **487**
See MORTGAGE. 2.

INCOME—Apportionment of rents as between capital and income—Deficient security
See SETTLED LAND. 5. **171**

—— Capital or income—Annuity expressed to be payable out of income—Gift over "subject thereto" – – – **1**
See ANNUITY.

—— Capital or income—Settled land.
See under SETTLED LAND.

—— Will — Legacy contingent on legatee's attaining twenty-one—Time at which value to be ascertained—Legacy given to trustee for legatee – – **277**
See WILL. 7.

INDEMNITY—Mortgage—Express indemnity—Exclusion of implied indemnity – **669**
See MORTGAGE. 1.

—— Receiver — Partnership action — Insufficiency of assets — Claim against partners personally – – – **155**
See PARTNERSHIP. 2.

—— Trustee—Change of cestui que trust—Novation of right to indemnity **194**
See TRUSTEE. 3.

INDEPENDENT ADVICE— Gift — Influence—Dual relation—Son managing business for mother – – – – **723**
See FIDUCIARY RELATION.

INFANT — Contingent legacy by parent — Interest — Maintenance — Share of residue – – – – – **108**
See WILL. 3.

INFLUENCE—Fiduciary relation.
See under FIDUCIARY RELATION.

INFRINGEMENT—Patent.
See under PATENT.

INJUNCTION—Copyright.
See under COPYRIGHT.

—— Passing off—Get-up—Useful combination —Former patent—Claim for monopoly
See PASSING OFF. **5**

—— River—Pollution of.
See under RIVER.

—— Solicitor—Contract of service—Restrictive undertaking – – – **326**
See SOLICITOR.

—— Staircase overlooking bedroom—Privacy —Comfort—Flats – – – **219**
See LANDLORD AND TENANT.

INSURANCE -Guarantee- Suretyship—Release of guarantor—"Arrangement or compromise" - - - - - **138**
See COMPANY. 2.

INTEREST — Infant — Contingent legacy by parent—Maintenance—General rule—Share of residue - - - **108**
See WILL. 3.

—— Tenant for life and remainderman—Will—Settled mortgages—Arrears of interest at testator's death - - **171**
See SETTLED LAND. 5.

INVESTMENT — Trustee — Breach of trust — Insufficiency of security—Mortgage—Trade buildings - - - **758**
See TRUSTEE. 4.

JUDICIAL TRUSTEES.
See under TRUSTEE.

JURISDICTION—Chancery Division to restrain proceedings in Palatine action, Jurisdiction of — Vexatious proceeding — Receiver - - - - - **731**
See LANCASTER PALATINE COURT.

—— Trade union—Ultra vires—Expulsion of member—Action for rescission of resolution — Illegal association — Restraint of trade - - - **540**
See TRADE UNION.

LANCASTER PALATINE COURT—*Jurisdiction of Chancery Division to restrain Proceedings in Palatine Action — Vexatious Proceeding—Receiver—Chancery of Lancaster Act,* 1890 (53 *&* 54 *Vict. c.* 23), *ss.* 3, 4, 5.

Where a debenture-holder in a company carrying on business in the County Palatine of Lancaster (the debentures creating a first charge on all the company's assets and stipulating that the company should not create any subsequent charge in priority thereto) commenced a representative action in the Chancery Division of the High Court to enforce the debentures and gave notice of motion for the appointment of a receiver, and, before the motion came on for hearing, the owner of an equitable charge granted by the company after the issue of the debentures on land acquired by it in Manchester commenced an action in the Lancaster Palatine Court, with full knowledge of the High Court action, to enforce his security and obtained ex parte the appointment of a receiver, who was subsequently continued on notice, notwithstanding that in the meantime, to the knowledge of the Palatine Court, a different person had been appointed receiver in the High Court action :—

Held, upon a motion in the Chancery Division by the plaintiff in the High Court action for an injunction to restrain the plaintiff in the Palatine action, who had since been added as a defendant to the High Court action, from further proceeding with the Palatine action, that the Court had jurisdiction to grant the injunction, and that that jurisdiction ought to be exercised on the ground that the Palatine action was vexatious.

LANCASTER PALATINE COURT—*continued.*

Except under extraordinary circumstances the Court ought not to appoint a receiver ex parte. *In re* CONNOLLY BROTHERS, LIMITED. WOOD *v.* CONNOLLY BROTHERS, LIMITED - - - - - **C. A. 731**

LAND TAX—*Redemption—Land abutting on Highway—Exoneration ad medium filum—Presumption against—Subsequent Construction of Underground Railway—Part under Highway—Part under Land exonerated — Tolls—New Hereditament—Liability to Assessment—Land Tax Act,* 1797 (38 *Geo.* 3, *c.* 5), *ss.* 4, 17—*Land Tax Redemption Act,* 1802 (42 *Geo.* 3, *c.* 116), *ss.* 8, 38.

The redemption of land tax on land in its normal condition exonerates the land a centro usque ad cælum, and the exoneration extends to any future building or works subsequently constructed under the exonerated lands.

Metropolitan Ry. Co. v. *Fowler,* [1893] A. C. 416, 427 ; *Westminster Corporation* v. *Johnson,* [1904] 2 K. B. 737, 746, 750 ; and *Newton, Chambers & Co.* v. *Hall,* [1907] 2 K. B. 446, applied.

There is no presumption that the redemption exonerates an adjoining highway ad medium filum.

Hare v. *Putney Overseers,* (1881) 7 Q. B. D. 223, 233, and *Great Eastern Ry. Co.* v. *Hackney Board of Works,* (1883) 8 App. Cas. 687, 693, applied.

A railway was constructed under statutory powers partly under lands previously exonerated from land tax, partly under a highway adjoining exonerated lands. The company were empowered to charge tolls for passengers and goods :—

Held, that the portion of the railway constructed under the exonerated lands was free from land tax and that the power to charge tolls for passengers and goods was not a new and separate franchise assessable in respect of that portion.

Vauxhall Bridge Co. v. *Sawyer,* (1851) 6 Ex. 504, and *Charing Cross Bridge Co.* v. *Mitchell,* (1855) 4 E. & B. 549, 563, distinguished.

Held, also, that the portion of the railway under the highway was liable to land tax. CENTRAL LONDON RAILWAY COMPANY *v.* CITY OF LONDON LAND TAX COMMISSIONERS
Swinfen Eady J. 467

LAND TRANSFER—*Lease—Mortgage by Subdemise—Subsequent Registration of Lessee as Proprietor—Sale by Mortgagee under Power of Sale — Requirement by Purchaser that Mortgagee should procure Registration of himself as Proprietor—"Registered Land"—"Charge"—Land Transfer Act,* 1897 (60 *&* 61 *Vict. c.* 65), *s.* 16, *sub-s.* 2.

Where the owner of leaseholds in London, subject to a mortgage by sub-demise executed before registration of title under the Land Transfer Acts became compulsory, is registered under the Acts as the proprietor with a possessory title, and afterwards the mortgagee sells under his power of sale, the mortgagee is

LAND TRANSFER—*continued.*

not the vendor of "registered land" within s. 16, sub-s. 2, of the Land Transfer Act, 1897, and the purchaser cannot require him to register his charge before completion or to procure a transfer from the registered proprietor. *In re* VOSS AND SAUNDERS' CONTRACT **Warrington J. 42**

LANDLORD AND TENANT—*Light—Injunction—Easement — Quiet Enjoyment— Derogation from Grant—Staircase overlooking Bedroom—Privacy—Comfort—Flats.*

In September, 1905, a flat consisting of twelve rooms on the ground, first, and second floors of F. mansions was let to Mrs. L. In November, 1907, a flat on the ground floor of the mansions was let to the plaintiffs. Both flats had windows overlooking a garden belonging to the lessors. Mrs. L.'s agreement contained a clause prohibiting the use of her flat otherwise than as a dwelling-house, and the plaintiffs' agreement comprised a covenant for quiet enjoyment and a stipulation that they should not use their flat otherwise than as a private residence. Each agreement contained a stipulation that the tenants would not do anything on the demised premises which might be a nuisance to the lessors or to the occupiers of adjoining premises or which might tend to lessen the value thereof. In 1909 Mrs. L. sub-divided her flat and, with the consent of the lessors, erected an open-work iron staircase from the garden to an entrance to her flat on the first floor; and in 1910 let it and the part of her flat to which it gave access to K. The staircase was situated between the windows of two of the bedrooms in the plaintiffs' flat, and the fact that it was used as the only access to K.'s flat seriously affected the plaintiffs' privacy, for persons using the staircase could see directly into the rooms. The plaintiffs brought this action claiming to have the staircase removed, an injunction, or compensation:—

Held, that Mrs. L. had done nothing on her premises in breach of her covenant; that the flats were not the subject of any general building scheme; that the only interference with the plaintiffs' premises was interference with their comfort and privacy; that that was not a sufficient interference to bring the case within the principle that a derogation from a grant was a breach of a covenant for quiet enjoyment; and that the claim failed. BROWNE *v.* FLOWER – – **Parker J. 219**

—— Covenant by covenantor with himself and others—Joint right to enforce obligation—Lease—Assignee—Validity. *See* COVENANT. 1. **361**

—— Repairing covenants — Breach — Dilapidations — Damages — Lease by life tenant—Capital or income – **351**
See SETTLED LAND. 1.

LANDS CLAUSES ACTS—Tramways—Notice to treat not served on mortgagee—Possession taken by promoters—Subsequent notice to treat to mortgagee *See* TRAMWAYS. 1. **604**

LATENT DEFECT—in property sold—Underground watercourse – – – **521**
See VENDOR AND PURCHASER.

LEASE—Landlord and tenant.
See under LANDLORD AND TENANT.

—— Settled land.
See under SETTLED LAND.

LEGACY.
See under WILL.

LIGHT—Easement—Quiet enjoyment—Derogation from grant—Staircase overlooking bedroom — Privacy — Comfort —Flats – – – – – **219**
See LANDLORD AND TENANT.

LIMITATIONS, STATUTE OF—*Trust Fund—Payment by Trustee to wrong Cestui que Trust—Mistake of Fact—Claim by one Cestui que Trust to recover from another Cestui que Trust—Money Demand—Lapse of Time—Limitation Act,* 1623 (21 *Jac.* 1, *c.* 16).

An action brought in the Chancery Division by one cestui que trust against another cestui que trust to recover money wrongly paid by the trustee to the latter under a common mistake of fact is in the nature of a common law action for money had and received, and the Court, acting on the analogy of the Limitation Act, 1623, will hold the claim to be barred after the lapse of six years.

The case would be different if the claim were made in an action in which the Court was administering the trust estate. There, if there were assets to which the overpaid cestui que trust was entitled, the Court would adjust the accounts as between the parties entitled, and lapse of time would be no bar.

Harris v. *Harris* (No. 2), (1861) 29 Beav. 110, explained. *In re* ROBINSON. MCLAREN *v.* PUBLIC TRUSTEE – – **Warrington J. 502**

—— Building society — Acknowledgment of mortgagor's title – – – **698**
See BUILDING SOCIETY.

LIMITED PARTNERSHIPS.
See under PARTNERSHIP.

LOCAL GOVERNMENT — Hospital, Joint — Management expenses — Agreement for apportionment — Adjustment of liabilities – – – – – **229**
See HOSPITAL.

—— River—Pollution of—Injury to reversion —Injunction at suit of private individual—Costs of shorthand note—Joint note – – – – – – **393**
See RIVER.

LONG VACATION—Patent—Revocation—Time for appealing – – – – **60**
See PATENT. 2.

MAINTENANCE—Infant.
See under INFANT.

MANSION HOUSE—Settled estates—Carvings—Right of removal as between executor and devisee or heir – – **237**
See FIXTURES.

MARKET—*Statutory Market—Market Rights—Disturbance — Rival Market — Warehouse — "Own shop or shops" — Local Act—Trustees —Waiver.*

The Southwark Borough Market was founded by a local Act of 28 Geo. 2 which enabled the churchwardens, overseers, and certain elected inhabitants to erect and hold the market, and for preventing any encroachments enacted that no person should erect or hold any other market in the Borough of Southwark or sell any provisions usually sold in public markets in any stall in any high street of the said Borough within 1000 yards of the bounds of the said market. An amending Act of 30 Geo. 2 prohibited under a penalty of 40*s.* all persons from selling or offering for sale any "beef . . . . fish, fruit, herbs, oatmeal or other victuals or provision whatsoever in any private house, lane, alley, inn, warehouse, street, stall, common passage or other place within 1000 yards of the market but only in his, her, or their private shop or shops." A new body of trustees was appointed by the London Government Scheme (Southwark Borough Market) Confirmation Act, 1907. The defendant was the lessee of a large building fronting the market on the opposite side of a street. The building consisted of four floors. The ground floor was separated from the street by archways which were open while business was going on and at other times closed by revolving shutters. The second and third floors were used for the storage of fruit and vegetables intended for immediate sale. The building had been described by the defendant himself in his return to the rating authority as a warehouse. In this building the defendant carried on the business of selling fruit and vegetables, partly his own, but very largely consigned to him by other persons for sale. He had previously carried on the same business at stalls in the market, which had become wholly a fruit and vegetable market. The market trustees brought this action to restrain the defendant from carrying on this business on the grounds that he was setting up a rival market, and not selling in his own shop. It was proved that similar businesses to that of the defendant had for many years been carried on in the vicinity of the market without complaint from the predecessors of the plaintiffs :—

Held, that the defendant was not setting up a rival market, and that on the true construction of the Act the words "warehouse" and "shop" were not mutually exclusive, but a building part of which was used as a warehouse for the storage of goods intended for immediate sale might be, and the defendant's building was, his "own shop" within the meaning of the Act ; and that the defendant's selling other people's goods on commission did not take the sales out of the exception in the Act. The action was dismissed.

Semble, a body constituted, as the plaintiffs were, by statute has no power of waiving or abandoning powers or rights entrusted to it as trustees for the inhabitants.

Goldsmid v. *Great Eastern Ry. Co.*, (1883) 25 Ch. D. 511 ; (1884) 9 App. Cas. 927, distinguished. HAYNES *v.* FORD – **Neville J. 375**

MARKET—*continued.*

MARRIAGE—Gift of income during widowhood —Subsequent marriage with deceased sister's husband—Effect of marriage being validated by statute – **310**
See HUSBAND AND WIFE.

MARRIAGE SETTLEMENT.
See under SETTLEMENT.

MARRIED WOMAN.
See under HUSBAND AND WIFE.

MARSHALLING—Will—Part of specific legacy applied in payment of debt—Compensation out of residuary estate
See WILL. 7. **277**

MEETINGS — Company — Increase of capital —Sanction of preference shareholders by resolution at separate meeting—All preference shares held by one person—"Meeting" – – – – **163**
See COMPANY. 5.

MEMORANDUM OF ASSOCIATION—Company.
See under COMPANY.

MISAPPROPRIATION—Solicitor.
See under SOLICITOR.

MISFEASANCE — Directors — Qualification shares held in trust for promoter—Damages – – – – – **346**
See COMPANY. 4.

—— Directors' gross negligence—Misstatements in prospectus — Directors deceived — Clause in articles exempting directors from liability – – – – **425**
See COMPANY. 9.

MISTAKE—Trust fund—Payment by trustee to wrong cestui que trust—Mistake of fact—Lapse of time – – – **502**
See LIMITATIONS, STATUTE OF.

MONEY-LENDER—*Registration—Firm Name—Partners' Names—Real Partner's Name not registered — Securities void — Assignee for Value without Notice — Money-lenders Act,* 1900 (63 & 64 *Vict. c.* 51), *s.* 1, *sub-s.* 5 ; *s.* 2, *sub-s.* 1 (*a*), (*c*) ; *s.* 3.

A purchaser or assignee for value without notice of charges or securities which are void under s. 2 of the Money-lenders Act, 1900, is in no better position than the original holder. That Act gives no protection to any bona fide assignee for value without notice except in the cases expressly dealt with by s. 1, sub-ss. 1, 2, and 3.

Decision of Neville J., [1910] 2 Ch. 471, affirmed. *In re* ROBINSON. CLARKSON *v.* ROBINSON – – – – – **C. A. 230**

MORTGAGE — *Contingent Reversionary Interest — Equity of Redemption — Purchase — Implied Liability of Purchaser to indemnify Vendor against Mortgage Debt—Interest vesting in Possession — Express Indemnity — Exclusion of implied Indemnity.*

The rule in equity which, in the absence of express contract to the contrary, throws upon the purchaser of an equity of redemption

MORTGAGE—*continued.*

the implied obligation of indemnifying the vendor against the mortgage debt, is conditional upon the interest vesting in possession; and until that event has happened the person claiming the benefit of the implied covenant cannot sue.

Waring v. *Ward*, (1802) 7 Ves. 332, 336, followed.

Where the deed of assignment of an equity of redemption provides for an express and limited indemnity, the fuller indemnity which might otherwise be implied is excluded. MILLS *v.* UNITED COUNTIES BANK, LIMITED

Eve J. 669

2. —— *Husband and Wife of Wife's Property, Mortgage by—Payment of Mortgage Money to Husband and Wife—Presumption—Exoneration of Wife's Property.*

Where a wife concurs with her husband in mortgaging her property and it appears on the face of the mortgage deed that the money was paid to the husband, or, before 1883, to the husband and wife, the Court infers, subject to rebutting evidence, that the debt is the debt of the husband, and that the wife's property is a surety for it. By way of rebuttal it may be shewn either that the money was in fact paid to the wife in such a way as to become her separate property or that it was applied by the husband for her benefit.

Dictum of Wood V.-C. in *Hudson* v. *Carmichael*, (1854) Kay, 613, 620, to the above effect followed.

The above dictum has not been affected by the dicta of Lindley M.R. in *Paget* v. *Paget*, [1898] 1 Ch. 474, 475. HALL *v.* HALL

Warrington J. 487

3. —— *Payment off of Mortgage—Duty of Mortgagee to reconvey on Payment of Principal, Interest, and Costs—Refusal of Mortgagee to execute indorsed Reconveyance in exchange for Money due—Action for Redemption — Costs of Action — Mortgagor and Mortgagee—Practice.*

It is the duty of a mortgagee on being paid by the mortgagor the principal, interest, and costs due upon the mortgage, and contemporaneously with such payment, to hand to the mortgagor the title deeds together with a duly executed reconveyance of the mortgaged property.

Walker v. *Jones*, (1866) L. R. 1 P. C. 50, 61, followed.

Where therefore a mortgagor who had given notice to the mortgagee that he would attend for that purpose made a tender of the amount due upon the mortgage and the mortgagee refused to hand over to the mortgagor then and there an indorsed reconveyance of the mortgaged property with the title deeds, and an action for redemption was subsequently brought by the mortgagor, the Court refused to allow the mortgagee interest and costs subsequent to the date of the tender and ordered him to pay the costs of the action.

Cotterell v. *Stratton*, (1872) L. R. 8 Ch. 295, 302, followed. ROURKE *v.* ROBINSON

Warrington J. 480

MORTGAGE—*continued.*

—— Bill of sale—Mortgage of heirlooms by reversioner—Non-registration – **282**
See BILL OF SALE.

—— Building society—Mortgage to society—Statutory accounts—Acknowledgment of mortgagor's title – – – **698**
See BUILDING SOCIETY.

—— Land transfer—Lease—Mortgage by subdemise — Subsequent registration of lessee as proprietor – – – **42**
See LAND TRANSFER.

—— Mortmain—Charitable bequest—Colonial mortgages—Movables or immovables—Adoption of English law by Colony
See CONFLICT OF LAWS. 2. **179**

—— Partnership — Mortgage by partners of real estate—Death of partners—Covenant by trustees—Effect – – **414**
See COVENANT. 2.

—— Tenant for life and remainderman—Receipt of rents of mortgaged properties by trustees—Deficient security – **171**
See SETTLED LAND. 5.

—— Tramways—Notice to treat not served on mortgagee – – – – **604**
See TRAMWAYS. 1.

—— Trustee — Breach of trust — Insufficient security—Mortgage—Trade buildings
See TRUSTEE. 4. **758**

MORTMAIN — Charitable bequest — Colonial mortgages—Movables or immovables—Lex domicilii—Lex rei sitæ—Adoption of English law by Colony – **179**
See CONFLICT OF LAWS. 2.

NEGLIGENCE — Company — Directors' gross negligence — Misstatements in prospectus — Directors deceived—Clause in articles exempting directors from liability – – – – – **425**
See COMPANY. 9.

NOTICE—Bankruptcy—Intervention of trustee in bankruptcy – – – – **687**
See BANKRUPTCY.

—— Certificate that shares were fully paid—Estoppel—Allotment to partnership—Partner one of directors who signed certificate – – – – – **86**
See COMPANY. 8.

—— Money-lenders — Registration — Real partner's name not registered — Securities void—Assignee for value without notice – – – – **230**
See MONEY-LENDER.

—— Tramways—Notice to treat not served on mortgagee – – – – – **604**
See TRAMWAYS. 1.

NOVATION—Trustee—Indemnity—Change of cestui que trust—Novation of right to indemnity – – – – – **194**
See TRUSTEE. 3.

PARTNERSHIP — *Limited Partnership — Winding-up—Just and Equitable—Limited Partnerships Act,* 1907 (7 *Edw.* 7, *c.* 24)—*Companies* (*Consolidation*) *Act,* 1908 (8 *Edw.* 7, *c.* 69), *s.* 268, *sub-s.* 1, *cl. vii.*—*Limited Partnerships* (*Winding-up*) *Rules,* 1909.

Where a limited partnership was being carried on at a loss, and the general partner, who had made several drawings on account of profits, refused, without any sufficient reason, to sign the annual general account under which drawings in excess of profits would be repayable, and otherwise acted in a way calculated prejudicially to affect the carrying on of the business :—

Held, that the limited partner was entitled to a winding-up order. *In re* HUGHES & Co. **Swinfen Eady J. 342**

2. —— *Receiver — Partnership Action — Consent Order appointing Receiver and Manager — Payments by Receiver — Insufficiency of Assets—Indemnity—Claim against Partners personally.*

In an action for dissolution of partnership a receiver and manager was, by a consent order, appointed to carry on the partnership business with a view to its sale as a going concern. In carrying on the business the receiver and manager made payments which the assets were insufficient to satisfy in full and claimed to be indemnified by the partners personally in respect of the balance due to him :—

Held, that the receiver was an officer of the Court and could only look to the assets under the control of the Court for his indemnity.

Held, therefore, that he was not entitled to be indemnified by the partners personally, and that the fact that the order appointing him was made by consent of the partners did not put him in any better position as against them. BOEHM *v.* GOODALL **Warrington J. 155**

—— Certificate that shares were fully paid—Estoppel—Allotment to partnership—Partner one of directors who signed certificate—Notice – – – **86**
See COMPANY. 8.

—— Debtor legatee — Set-off — Retainer of legacy in satisfaction of debt—Partnership debt – – – – **716**
See ADMINISTRATION.

—— Money-lenders—Registration—Firm name — Partners' names — Real partner's name not registered—Securities void—Assignee for value without notice **230**
See MONEY-LENDER.

—— Mortgage by partners of real estate—Death of partners—Covenant by trustees—Effect – – – – **414**
See COVENANT. 2.

PARTNERSHIPS (LIMITED) (WINDING-UP) RULES, 1909 – – – – **342**
See PARTNERSHIP. 1.

PASSING OFF—"*Get-up*"—*Useful Combination—Article in Common Use—Former Patent—Claim for Monopoly—Injunction.*

The useful part of an article, as distinguished from an ornamental addition, cannot be regarded as part of the get-up of the article. The word "get-up" implies something extraneous to the article.

No length of exclusive user can entitle a trader to a monopoly in the manufacture and sale of a useful combination not protected by patent. W. EDGE & SONS, LIMITED v. W. NICCOLLS & SONS, LIMITED – – **C. A. 5**

PATENT—*Infringement—Specification—Amendment by Comptroller—Writ in Infringement Action issued after Application to amend but before Amendment of Specification—Amended Specification put in Evidence—Patents and Designs Act,* 1907 (7 *Edw.* 7, *c.* 29), *ss.* 21, 22, 23.

Where the writ in an action for infringement of a patent is issued after the patentee has applied to the Comptroller for leave to amend his specification, and leave to amend is granted to him after the issue of the writ, the proper specification to put in evidence and to refer to at the trial as a description of the invention is the specification as it stands after amendment. STEPNEY SPARE MOTOR WHEEL COMPANY *v.* HALL – **Warrington J. 514**

2. —— *Revocation — Appeal — Time for appealing—Long Vacation—Practice—Extension of Time—Special Circumstances—Dilatoriness—Patents and Designs Act,* 1907 (7 *Edw.* 7, *c.* 29), *s.* 26—*Rules of the Supreme Court,* 1883, *Order* LIII.A, *r.* 4; *Order* LVIII., *r.* 15; *Order* LXIV., *r.* 7.

On August 4, 1910, the Comptroller refused an application for revocation of a patent. The applicant thereupon instructed his solicitors to take the necessary steps to appeal, but their clerk who was in charge of the matter had gone away for his holidays, and nothing was done till the end of August, when instructions were sent to counsel to prepare a petition for appeal. He was away from London and wrote that he had no facilities for drawing it and could not do so. This letter reached the solicitors on September 2, too late to make an application in chambers or instruct other counsel. The time limited by Rules of the Supreme Court 1883, Order LIII.A, r. 4, for presenting a petition for appeal expired on September 4 :—

Held, that time included in the Long Vacation must be counted in ascertaining the month allowed for appealing, and therefore that the appeal was out of time; and, further, that dilatoriness was not a "special circumstance" within Rules of the Supreme Court, 1883, Order LIII.A, r. 4, so as to enable the applicant to obtain an enlargement of the time. *In re* BELDAM'S PATENT – – **Parker J. 60**

3. —— *Revocation — Patented Article or Process manufactured or carried on exclusively or mainly out of the United Kingdom—Articles manufactured in the United Kingdom in infringement of Patent — Patents and Designs*

PATENT—*continued.*

Act, 1907 (7 *Edw.* 7, *c.* 29), *s.* 25, *sub-s.* 2; *s.* 27.

On an application for revocation of a patent on the ground that the patented article or process is manufactured or carried on exclusively or mainly outside the United Kingdom, the Comptroller of Patents, in computing the extent to which the article or process for which the patent has been obtained is, within the meaning of s. 27, sub-s. 1, of the Patents and Designs Act, 1907, manufactured or carried on within the United Kingdom, ought not to inquire whether what has been done in the United Kingdom is or is not in derogation of the patentee's rights under his patent, or to exclude from the computation what has been done by infringers of the patent in derogation of those rights.

Quære whether s. 27, sub-s. 2, of the Act does not render lawful everything done while the patent is revocable, although it would otherwise be an infringement. *In re* FIAT MOTORS, LIMITED'S APPLICATION **Parker J. 66**

—— Passing off—Get-up—Useful combination —Former patent—Claim for monopoly —Injunction – – – – **5**
See PASSING OFF.

4. —— *Revocation — Patented Article or Process manufactured or carried on exclusively or mainly outside the United Kingdom—Process—Cessation of Business—Sale of remaining Stock—Patents and Designs Act,* 1907 (7 *Edw.* 7, *c.* 29), *s.* 27, *sub-s.* 1.

In considering whether a patent ought to be revoked under s. 27, sub-s. 1, of the Patents and Designs Act, 1907, on the ground that the "patented article or process is manufactured or carried on exclusively or mainly outside the United Kingdom," the Court is not bound to determine that at the precise moment when the petition was lodged there was a manufacture of the patented article or a carrying on of the patented process; a temporary cessation of manufacture and a sale of stock in the meantime will not prevent the operation of the sub-section; but where the manufacture and business are entirely and permanently stopped the section will not apply merely because the remaining stock is sold after the business has come to an end. *In re* GREEN'S APPLICATION – – **Parker J. 754**

PERPETUITY — Highway — Agreement with local authority to take over liability in perpetuity – – – – **648**
See HIGHWAY.

—— Will — Construction — Implied estate—Destructibility—Antecedent estate
See WILL. 4. **255**

PHOTOGRAPHS—Copyright.
See under COPYRIGHT.

PLATE—*Assay—Hall Mark—Foreign Enamels on a Gold or Silver Base — Chain Watch-Bracelets—Plate (Offences) Act,* 1738 (12 *Geo.* 2, *c.* 26), *ss.* 2, 6—*Customs Act,* 1842 (5 *&* 6 *Vict. c.* 47), *s.* 59—*Revenue Act,* 1883 (46 *&* 47 *Vict. c.* 55), *s.* 10—*Hall-marking of Foreign Plate Act,* 1904 (4 *Edw.* 7, *c.* 6), *s.* 1.

The word "plate," as used in ss. 2 and 6 of the Plate (Offences) Act, 1738, s. 59 of the Customs Act, 1842, s. 10 of the Revenue Act, 1883, and the Hall-marking of Foreign Plate Act, 1904, includes every article of gold or silver imported from abroad which, if it had been made in the United Kingdom, would have been subject to the provisions as to assaying and marking contained in the Act of 1738.

Where an article—such as a match-box, cigarette case, or letter clip—is once a "manufacture of gold or silver," within the meaning of that term as used in the Act of 1738, it does not cease to be such because it is used as the base or foundation of enamel work, however great the artistic merit of that work is as compared with the value of the gold or silver.

Enamel worked on a gold or silver foundation—even if it is a jewel—is not "set" in the gold or silver within the meaning of that word as used in s. 2 of the Act of 1738.

An enamelled gold cigarette case, the enamel of which is worked on the gold foundation (even if an enamel is a "jewel"), is not "set" in the gold within the meaning of that word as used in s. 6 of the Act of 1738.

Gold watches which are jewelled and set in gold chain bracelets are not exempt from being hall-marked. FABERGÉ *v.* GOLDSMITHS' COMPANY – – – – **Parker J. 286**

PORTIONS—Younger children—Eldest son **708**
See SETTLEMENT. 1.

POWER OF APPOINTMENT — *Exercise — Special Power—Appointment to Object of Power—Condition to pay Appointor's Debts—Purpose foreign to Power—Fraud on Power—Invalidity.*

The donee of a special power to appoint his share under his father's will to his wife and children, in exercise of the power, appointed an annuity of 1200*l.* to his wife, and in case his residuary estate should be insufficient to pay his just debts he directed that the trustees of his father's will should pay to his wife an additional annuity of 500*l.* so long as any of his debts should remain unpaid or for a period of ten years from his death, whichever should be the shorter period, on condition that, and so long as, she should expend the sum of 400*l.* in every year in the payment of his debts; and after the debts should have been fully paid by her or after the expiration of ten years from his death, whichever should be the shorter period, to pay to her, if she should have fulfilled the condition, instead of the additional annuity of 500*l.*, an additional annuity of 100*l.* for the remainder of her life, and subject thereto he appointed the trust funds to his children:—

Held, that the condition could not fairly be separated from the appointment, and that the execution of the power was fraudulent and void as having been made for a purpose

POWER OF APPOINTMENT—*continued.*

wholly foreign to the power. The appointment of the additional annuities was therefore bad. *In re* COHEN. BROOKES *v.* COHEN
Joyce J. 37

2. —— *Fraud on Power—Appointment void or voidable—Bona fide Purchaser for Value without Notice—Reversionary Interest—Deed of Compromise—Effect of carrying Fund to Separate Account—Action to set aside Appointment—Priority.*

An appointment under a common law power, or a power operating under the Statute of Uses, by which the legal estate has passed, is at most voidable, and a purchaser for value with the legal estate and without notice is not affected by the fraudulent execution of the power; but an appointment in fraud of an equitable power, not operating so as to pass the legal estate or interest, is void, and a purchaser for value without notice can only rely on such equitable defences as are open to purchasers without the legal title who are subsequent in time against prior equitable titles.

It is not in accordance with principle or authority to construe deeds of compromise of ascertained specific questions so as to deprive any party thereto of any right not then in dispute and not then in contemplation by any of the parties to the deed:—

Held, therefore, that persons claiming in default of appointment were not precluded from bringing an action to set aside a fraudulent appointment by the execution of a deed of compromise of this nature.

The carrying over in an administration action of a fund to the separate account of the purchaser, subject to a life interest, is not equivalent to transfer or payment so as to give the purchaser a legal title.

The separate account is merely the machinery by which the Court has carried its declaration into effect, and so long as the fund remains in Court, that machinery is under the control of the Court.

Decision of Neville J. affirmed. CLOUTTE *v.* STOREY – – – – – – **C. A. 18**

3. —— *General Power—Execution—Exercise by Will—Appointment of Executors and Bequest of Pecuniary Legacies — Estate of Testatrix insufficient alone to pay Debts and Legacies—Extent of Appointment—Wills Act*, 1837 (1 *Vict. c.* 26), *s.* 27.

The execution by the donee of a general power of appointment of a will containing no residuary bequest of personal estate but merely the appointment of executors and bequests of general pecuniary legacies will, in the event of the donee's own estate proving insufficient to pay the debts and legacies, operate under s. 27 of the Wills Act, 1837, as an execution of the power to the extent of the amount necessary to enable both the debts and the legacies to be paid.

Dictum of Wickens V.-C. in *In re Davies' Trusts*, (1871) L. R. 13 Eq. 163, 166, followed. *In re* SEABROOK. GRAY *v.* BADDELEY
Warrington J. 151

POWER OF APPOINTMENT—*continued.*

—— "Devise bequeath and appoint"—Trusts for non-objects of power—Power and interest—Intention—Child en ventre sa mère – – – – – **246**
See WILL. 5.

—— Estate duty as non-appointed property —Charge on property—Repayment to executor – – – – – **188**
See REVENUE. 3.

—— Settlement—Cesser of life interest of husband on bankruptcy — Trust fund vested—Absence of express provision as to income—Children of marriage entitled pending appointment – **321**
See SETTLEMENT. 2.

PRACTICE — *Costs — Administration Action — Costs of Inquiries relating to particular Shares —Rules of the Supreme Court, Order LXV., r.* 14B.

A testatrix gave all her residuary estate to trustees upon trust after payment of funeral and testamentary expenses to divide the estate into three funds to be held on separate trusts. The trusts of the second fund were, in the events which happened, to hold one moiety upon the trusts declared concerning the first fund, and the other moiety upon the trusts declared concerning the third. Inquiries were directed to ascertain the persons entitled under the trusts declared concerning the first and third funds respectively, and the inquiries relating to the first fund proved much more costly than those relating to the third fund:—

Held, that each moiety was a share within the meaning of Rules of the Supreme Court, Order LXV., r. 14B, and there being no special reasons to induce the Court to "direct otherwise," the costs of the several inquiries must be paid out of the moiety to which they respectively related. *In re* WHITAKER. DENISON-PENDER *v.* EVANS – – **Neville J. 214**

PREFERENCE SHARES—Company—Increase of capital — Alteration of rights of preference shareholders—"Meeting"
See COMPANY. 5. **163**

PRESUMPTION — Land tax — Redemption — Land abutting on highway—Exoneration ad medium filum—Presumption against – – – – – **467**
See LAND TAX.

—— Mortgage money to husband and wife, Payment of — Exoneration of wife's property – – – – – **487**
See MORTGAGE. 2.

PRINCIPAL AND AGENT—*Manager of Real Estates—Limited Company appointed Agent—Agreement—Construction—Charge for keeping Accounts—Company employing its Directors in the Management—Profit Costs—Salary and Commission.*

By an agreement of April, 1893, a company arranged with the plaintiff to manage, develop, and realize his estates on certain terms as to remuneration, and in the course of such

PRINCIPAL AND AGENT—*continued.*

management employed one of its directors, who was a solicitor, to act professionally for the estates and paid his bill of costs, which included profit items; another director, who was an estate agent, to manage at a salary a business connected with the estates; another director, who was an auctioneer, to act as auctioneer on all sales of the estates at the usual commission; and gave its secretary, who was a chartered accountant, an additional salary for keeping the books of the estates, which were of a complex nature:—

Held, affirming Neville J.'s decision, that on the construction of the agreement the company were not entitled to make any charge for or in respect of the keeping of the accounts required to be kept by the company.

Held, also (dissentiente Fletcher Moulton L.J.), that the directors stood in a fiduciary relation to the company, but not to the plaintiff, and that the profit costs, salary, and commission paid to the directors in their professional capacity might be allowed in taking the accounts between the plaintiff and the company under the agreement.

Decision of Neville J., [1910] 2 Ch. 408, reversed on this point.

Kavanagh v. *Workingman's Benefit Building Society,* [1896] 1 I. R. 56, discussed and disapproved.

Per Fletcher Moulton L.J.: Where a limited company undertakes the administration of a trust, the directors, as individuals, are in a different position from an ordinary agent, and are liable for matters of personal conduct inconsistent with their full knowledge of the fiduciary character of the duties which in the name of the company they have to carry out, and, consequently, in the present case the directors could not use their position as de facto administrators of a trust to profit themselves or one another. BATH *v.* STANDARD LAND COMPANY, LIMITED – – **C. A. 618**

PRINCIPAL AND SURETY — Debentures — Guarantee — Insurance — Suretyship — Release of guarantor—"Arrangement or compromise" – – **138**
See COMPANY. 2.

PRIORITY — Fraud on power — Appointment void or voidable—Deed of compromise
See POWER OF APPOINTMENT. 2. **18**

"PROFITS"—Contract of service—Cumulative salary payable out of "profits"—Undrawn profits—Arrears of salary **92**
See COMPANY. 1.

PROMOTER — Company—Directors — Qualification shares held in trust for promoter —Misfeasance—Damages – – **346**
See COMPANY. 4.

PROSPECTUS—Company.
See under COMPANY.

PUBLIC HEALTH—Highway.
See under HIGHWAY.

—— River—Pollution of – – – **393**
See RIVER.

PUBLIC TRUSTEE.
See under TRUSTEE.

PURCHASER—Vendor and.
See under VENDOR AND PURCHASER.

QUALIFICATION — Directors — Shares held in trust for promoter — Misfeasance — Damages – – – – – **346**
See COMPANY. 4.

QUIET ENJOYMENT—Derogation from grant—Staircase overlooking bedroom — Privacy—Comfort—Flats – – **219**
See LANDLORD AND TENANT.

RAILWAY—Land tax—Underground railway—Part under highway—Part under land exonerated—Tolls—New hereditament —Liability to assessment – **467**
See LAND TAX.

RECEIVER—Jurisdiction of Chancery Division to restrain proceedings in Palatine action—Vexatious proceeding – **731**
See LANCASTER PALATINE COURT.

—— Partnership action — Insufficiency of assets — Indemnity — Claim against partners personally – – – **155**
See PARTNERSHIP. 2.

RECONVEYANCE—Duty of mortgagee to reconvey on payment of principal, interest, and costs – – – – – **480**
See MORTGAGE. 3.

REDEMPTION—Land tax.
See under LAND TAX.

—— Mortgage.
See under MORTGAGE.

REGISTRATION—Bill of sale.
See under BILL OF SALE.

—— Land transfer.
See under LAND TRANSFER.

—— Money-lender.
See under MONEY-LENDER.

REMOTENESS—Devise of real estate—Gift of proceeds to unascertained class– **116**
See WILL. 2.

RENT—Arrears of—Accruing rent—Apportionment — Tithe rent-charge — Net or gross rents – – – – **455**
See WILL. 6.

—— Use for accumulation of rents—Person having the powers of a tenant for life – – – – – – **451**
See SETTLED LAND. 3.

RENT-CHARGE—Tithe—Will—Arrears of rent — Accruing rent — Apportionment—Net or gross rents – – – **455**
See WILL. 6.

REPAIRS—Capital or income—Lease by life tenant—Repairing covenants—Breach —Dilapidations – – – **351**
See SETTLED LAND. 1.

—— Highway.
See under HIGHWAY.

RESIDUE—Specific legatee—Distinct trusts—Default in respect of residue – 662
See TRUSTEE. 7.

RESTRAINT OF TRADE—Trade union—Ultra vires—Expulsion of member—Illegal association—Jurisdiction – – 540
See TRADE UNION.

RETAINER—Debtor legatee—Set-off—Retainer of legacy in satisfaction of debt—Partnership debt – – – 716
See ADMINISTRATION.

REVENUE—*Estate Duty—Apportionment—Marriage Settlement—Sum secured by Covenant and charge on Real Estate—Death of Covenantor — Incidence of Duty — Scottish Decision on similar Point—Finance Act,* 1894 (57 & 58 *Vict. c.* 30), *s.* 14, *sub-s.* 1.

In a case arising on the construction of a statute equally applicable to England and Scotland it is the duty of an English Court of first instance to follow a unanimous decision of the Court of Session.

A sum payable to the trustees of a marriage settlement on the death of the wife's father with interim interest during his life was secured by his covenant in the settlement and by an equitable charge on real estate.

There was no money consideration for the covenant or charge, so that on the covenantor's death estate duty became payable thereon:—

Held, that s. 14, sub-s. 1, of the Finance Act, 1894, was applicable, and consequently that the settlement trustees must pay the proper rateable part of the estate duty in respect of the property comprised in their security.

Alexander's Will Trustees v. *Alexander's Settlement Trustees,* 1910, S. C. 637, followed. *In re* HARTLAND. BANKS *v.* HARTLAND – – – – **Swinfen Eady J. 459**

2. —— *Estate Duty — Incidence — Donatio Mortis Causa—Will—Direction to pay Testamentary Expenses—Estate Duty on Donation—Charge on Property—Finance Act,* 1894 (57 & 58 *Vict. c.* 30), *s.* 2, *sub-s.* 1; *s.* 6, *sub-s.* 2; *s.* 9, *sub-s.* 1; *s.* 22, *sub-s.* 2 (*a*).

The subject-matter of a donatio mortis causa is "property which does not pass to the executor as such" within s. 9, sub-s. 1, of the Finance Act, 1894. If, therefore, the executor pays the estate duty upon it, he will be entitled to recover from the donee the amount of the duty so paid, which, under the sub-section, will be a first charge on the subject-matter of the donation.

Estate duty on the subject-matter of a donatio mortis causa is not a testamentary expense, and is, therefore, not payable by the executor under a direction in a will to pay "testamentary expenses" out of the testator's residuary estate.

Porte v. *Williams,* [1910] W. N. 233; [1911] 1 Ch. 188, followed.

Quære, is the subject-matter of a donatio mortis causa property "of which the deceased was competent to dispose at his death" within the meaning of s. 6, sub-s. 2, of the Finance

REVENUE—*continued.*

Act, 1894? *In re* HUDSON. SPENCER *v.* TURNER – – – – **Warrington J. 206**

3. —— *Estate Duty — Incidence — Will — Power of Appointment — Non-exercise — "Testamentary Expenses"—Direction to Pay — Estate Duty on unappointed Property — Charge on Property—Repayment to Executor —Finance Act,* 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 6, *sub-s.* 2; *s.* 8, *sub-s.* 3; *s.* 9, *sub-ss.* 1, 4.

A testatrix, who, under her husband's will, had a life estate in and a general power of appointment over his residuary estate, by her will recited the power, and that she did not desire to exercise it, but desired that the trusts of her husband's will should upon her death take effect. She then gave all her real and personal estate (exclusive of any which should remain subject to the trusts of her husband's will) to her trustees in trust for conversion, and out of the proceeds thereof to pay her funeral and testamentary expenses, and subject thereto in trust for her daughter for life and after her death as she should appoint. On the death of the testatrix her executors paid the estate duty in respect of the value at her death of her husband's residuary estate:—

Held, that the testatrix's "testamentary expenses" did not include the estate duty in respect of the unappointed property of her husband, and that her executors were entitled to recover the amount of the duty so paid by them from the trustees of her husband's will.

In re Clemow, [1900] 2 Ch. 182, considered. PORTE *v.* WILLIAMS – – – **Joyce J. 188**

—— Plate — Assay — Hall-mark — Foreign enamels on a gold or silver base—Chain watch-bracelets – – **286**
See PLATE.

REVOCATION—Patent.
See under PATENT.

RIVER—*Pollution of River—Local Authority—Discharge of Sewage on Land of Riparian Owner—Nuisance—Injury to Reversion — Injunction at Suit of Private Individual—Practice—Costs of Shorthand Note—Joint Note —Costs in the Cause—Public Health Act,* 1875 (38 & 39 *Vict. c.* 55), *ss.* 17, 19, 21—*Local Government Act,* 1894 (56 & 57 *Vict. c.* 73), *s.* 25—*Rules of the Supreme Court,* 1883, *Order LXV., r.* 27, *sub-r.* 9.

A riparian owner on the banks of a natural stream, whether he is or is not the owner of any part of the bed of the stream, is entitled to the flow of the water, past his land, in its natural state of purity, undeteriorated by noxious matter discharged into it by others. Any one so fouling the water infringes a right of property of the riparian owner, who can maintain an action against the infringer without proving actual damage, and obtain an injunction to prevent the continuance of the injury.

Any one who turns fæcal matter, or allows fæcal matter collected by him or under his

RIVER—*continued.*

control to escape, into a river in such a manner or under such conditions that it is carried, whether by current or wind, on to his neighbour's land is, on the principle of *Rylands* v. *Fletcher*, (1868) L. R. 3 H. L. 330, guilty of a trespass.

Where the fæcal matter so causing injury is discharged from a sewer, on the principle of *Rylands* v. *Fletcher* the duty at common law of the owner of the sewer, whether he made it or not, is to prevent the sewage therein from escaping to the injury of others, and mere neglect of this duty gives a good cause of action to any person injured by such neglect.

A private individual is entitled to an injunction to restrain a local authority from allowing sewage to escape from its sewer to his injury, notwithstanding the statutory right of the inhabitants of the authority's district to send their sewage into its sewers.

Where that local authority was, before the Local Government Act, 1894, a board of guardians which had constructed a sewerage system, it was just as responsible as any private person for allowing sewage to escape therefrom to the injury of others, whether the injury consisted in fouling the water of a river in infringement of the rights of riparian owners or in depositing offensive matter on their land, and the liability of the guardians in this respect was by s. 25 of that Act transferred to rural district councils. The liability so transferred to a rural district council is passed on to an urban district council by an order which transfers to it the liabilities of a rural district council on part of the rural district being turned into an urban district.

Although a reversioner cannot maintain actions in the nature of trespass—including those for infringement of natural rights arising out of his ownership of land—without alleging and proving injury to his reversion, if what is complained of is of such a permanent nature that the reversion may be injured, the question of injury or no injury is one for the jury, or the tribunal which has to find the facts of the case, and where injury is found the reversioner may obtain an injunction without joining his tenant as a co-plaintiff.

Glossop v. *Heston and Isleworth Local Board*, (1879) 12 Ch. D. 102, observed upon.

Attorney-General v. *Dorking Union*, (1882) 20 Ch. D. 595, distinguished.

At the trial of the action the solicitors on each side agreed to have a joint shorthand note of the evidence taken, and that it should be used if necessary on an appeal. No arrangement was come to as to taking a transcript or making the costs costs in the action. Both sides took transcripts ; the learned judge also used them ; judgment was given for the plaintiffs with costs ; and they now moved for an order that the defendants should pay all the costs of the note and transcript as being costs of the action :—

Held, that an agreement to take a note

RIVER—*continued.*

jointly did not necessarily make the costs costs in the action, and the motion must be refused.

Osmond v. *Mutual Cycle and Manufacturing Supply Co.*, [1899] 2 Q. B. 488, distinguished. JONES *v.* LLANRWST URBAN DISTRICT COUNCIL - - - - - **Parker J. 393**

RULES OF THE SUPREME COURT — Order LIII.A, r. 4 - - - - **60**
See PATENT. 2.

—— **Order LVIII., r. 15** - - - - **60**
See PATENT. 2.

—— **Order LXIV., r. 7** - - - - **60**
See PATENT. 2.

—— **Order LXV. (Costs), r. 14 b** - - **214**
See PRACTICE.

—— —— **r. 27, sub-r. 9** - - - - **393**
See RIVER.

SALARY — Contract of service — Cumulative salary payable out of "profits"—Undrawn profits—Arrears of salary **92**
See COMPANY. 1.

SCOTTISH LAW — Matrimonial domicil — Incapacity of wife to acquire separate domicil — Scottish husband—English wife - - - - - - **578**
See CONFLICT OF LAWS. 1.

—— Revenue—Estate duty—Apportionment—Death of covenantor—Scottish decision on similar point - - - **459**
See REVENUE.

SERVICE—Contract of.
See under CONTRACT OF SERVICE.

SET-OFF—Debtor legatee—Retainer of legacy in satisfaction of debt—Partnership debt - - - - - - **716**
See ADMINISTRATION.

SETTLED ESTATES.
See under SETTLED LAND.

SETTLED LAND—*Capital or Income—Lease by Life Tenant — Repairing Covenants — Breach —Dilapidations—Damages—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 53.

Where a legal life tenant in possession without impeachment of waste recovers damages from a lessee for dilapidations to buildings arising from breaches of repairing covenants in a lease granted by a previous life tenant under the fiduciary powers of the Settled Land Act, 1882, the damages are capital moneys and must be paid to the trustees of the settlement or into Court.

Noble v. *Cass*, (1828) 2 Sim. 343, explained and distinguished. *In re* LACON'S SETTLEMENT. LACON *v.* LACON
Swinfen Eady J. 351

2. —— *Costs — Tenant for Life and Remainderman—Settled Estates—Proceedings for Protection of Estates—Costs of unsuccessful Litigation—Whether payable out of Capital*

SETTLED LAND—*continued.*

Moneys—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 36.

Where a tenant for life, without the previous sanction of the Court, institutes legal proceedings for the protection of the settled estate which ultimately prove unsuccessful, and subsequently applies to the Court that the costs of the proceedings may be paid out of the estate, the Court will consider the matter as though it were an application for leave to commence the proceedings at the cost of the estate.

On such an application the costs of unsuccessful litigation will not, as a rule, be allowed out of the estate where it appears that the proceedings were of a speculative nature, even although the tenant for life acted in good faith and under legal advice. *In re* YORKE. BARLOW *v.* YORKE – **Neville J. 370**

3. —— *Devise to Trustees in Fee Simple—Use for Accumulation of Rents until Son attained twenty-seven—Subject thereto, to Use of Son for Life—Son not yet twenty-seven—Person having the Powers of a Tenant for Life—Settled Land Act,* 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-ss.* 5, 7, 10 ; *s.* 58, *sub-s.* 1, *cl. vi.*

The testator devised certain real estate unto and to the use of his trustees in fee simple to the use that it should be lawful for them to receive the rents, profits, and annual income thereof until his son, the applicant, attained the age of twenty-seven years, paying thereout during such time the annual sum of 400*l.* to the applicant, and to accumulate the surplus which should devolve upon the same uses as the property itself, and subject thereto to the use of the applicant and his assigns during his life, with remainders over :—

Held, that the applicant, who had not yet attained the age of twenty-seven years, was by virtue of the provisions of s. 58, sub-s. 1, cl. vi., of the Settled Land Act, 1882, a person having the powers of a tenant for life under that Act. *In re* LLEWELLYN. LLEWELLYN *v.* LLEWELLYN – – – – **Joyce J. 451**

4. —— *Limited Owner—Powers of Tenant for Life—Trustees—Powers of Management—Widow entitled to Surplus Rents during Widowhood — "Forfeiture" — Settled Land Act,* 1882 (45 & 46 *Vict. c.* 38), *s.* 58, *sub-s.* 1, *clauses* (*vi.*), (*ix.*).

By his will, made in 1903, a testator devised all his real estate of every tenure unto and to the use of trustees upon trust that they should, out of the rents and profits thereof, and until the expiration of ten years after his death, or until the death or marriage again of his wife, whichever should be the longer period, pay certain annuities, and the costs and expenses of management of his estate, and should pay the ultimate residue of the rents and profits to his wife during her widowhood. Full powers of management were conferred upon the trustees by the will. The testator died in 1907. Upon a summons by the widow to determine whether she was a tenant for life, or had the powers of a tenant for life, under the Settled Land Acts in respect of the real estate settled by the will :—

Held, that she was a person entitled to the income of land under a trust for payment thereof to her during her life, or until forfeiture of her interest therein on her remarriage, and as such had the powers of a tenant for life under clause (ix.) of sub-s. 1 of s. 58 of the Settled Land Act, 1882.

The word "forfeiture" in clause (ix.) must be construed to include cesser, or determination on bankruptcy, alienation, remarrying, or any other event.

In re Baroness Llanover, [1907] 1 Ch. 635, distinguished, and the *semble* in the head-note discussed. *In re* SUMNER'S SETTLED ESTATES **Eve J. 315**

5. —— *Tenant for Life and Remainderman — Will — Settled Mortgages — Arrears of Interest at Testator's Death—Receipt of Rents of Mortgaged Properties by Trustees—Deficient Security—Apportionment of Rents as between Capital and Income.*

A testator gave his residuary real and personal estate to trustees upon trust to sell, with power to postpone, and to divide into shares, each share being settled. The testator's assets included several mortgage debts the interest on which was in arrear at his death. The testator had entered into and remained in receipt of the rents of the mortgaged properties up to his death, and the trustees had continued in such receipt. The securities being deficient, the question arose between the tenants for life and the remaindermen as to the application of these rents :—

Held, that the trustees must first apply each instalment of rent received since the testator's death from each mortgaged property in satisfaction of the arrears of interest which at the testator's death were due in respect of the mortgage, and then distribute the balance as income up to but not exceeding the interest accrued since the testator's death on the mortgage, and apply any excess as capital. *In re* COAKS. COAKS *v.* BAYLEY **Warrington J. 171**

—— Fixtures — Mansion house — Carvings—Right of removal as between executor and devisee or heir – – – **237**
See FIXTURES.

—— "Incumbrance"—Highway—Liability to repair ratione tenuræ – – **648**
See HIGHWAY.

—— "Personal chattels" — Bill of sale — Mortgage of heirlooms by reversioner —Non-registration – – – **282**
See BILL OF SALE.

—— Trustee, Public—Appointment by Court — Sole trustee — Provision as to number of trustees being not less than three – – – – – **611**
See TRUSTEE. 5.

SETTLEMENT —*Portions—Younger Children—Eldest Son—"Heir male or heir male apparent"—Younger Son afterwards becoming Eldest Son—Exclusion.*

By a marriage settlement made in 1861 real estate was limited to uses under which A. became tenant for life with remainder to his first and other sons in strict settlement. On the same day was executed a settlement of personalty by which it was declared that after the death of A. and his intended wife the trustees should stand possessed of the trust funds in trust for the children of the marriage "other than an eldest or only son or other son who before attaining the age of twenty-one years shall be or become the heir male or heir male apparent of" A. as A. and his wife should appoint. Each of the settlements was made in consideration of the marriage, but neither of them contained any express reference to the other. A. had five children—a son W., who attained twenty-one, disentailed and resettled the estate, and died a bachelor in 1899; a son V., who attained twenty-one, became eldest son on the death of W., and took a life interest under the resettlement; B., who died an infant; and two others who were still living. A. died in 1910, and V. thereupon became entitled to the settled real estate for his life:—

Held, that the two settlements must be read together, but that V. was not excluded from a share in the settled personalty. *In re* WROTTESLEY'S SETTLEMENT. WROTTESLEY *v.* FOWLER – – – – **Parker J. 708**

2. —— *Power of Appointment—Cesser of Life Interest of Husband on Bankruptcy—Trust Fund vested—Absence of Express Provision as to Income—Children of Marriage entitled pending Appointment.*

By a marriage settlement, dated September 4, 1878, a sum of 10,000*l.* was settled upon trust for the wife for life, and after her death, in the events which happened, upon trust for the husband for life, or until he should become bankrupt, and subject as aforesaid the trustees were to hold the said sum and the income thereof upon trust for the children or other issue of the marriage as the spouses should by deed jointly, or as the survivor should by deed or will, direct and appoint, and in default of appointment for all the children who, being sons, should attain twenty-one, or, being daughters, should attain that age or marry, in equal shares. The wife died in 1905, and in 1906 the husband, who had left for Australia many years before, was adjudicated bankrupt. There were three children of the marriage, all of whom had attained twenty-one, and one of them was married and had three infant children. So far as was known to the trustees, no appointment had been executed under either of the powers contained in the settlement.

Upon a summons by the trustees of the settlement to obtain directions as to how they should deal with the income of the settled property during the life of the husband and

SETTLEMENT—*continued.*

pending the exercise of the subsisting power of appointment:—

Held, upon the authority of *Coleman* v. *Seymour,* (1748) 1 Ves. Sen. 209, that the income of the trust fund was distributable in equal shares amongst the children of the marriage until and unless they were superseded by the exercise of the power. *In re* MASTER'S SETTLEMENT. MASTER *v.* MASTER – **Eve J. 321**

3. —— *Wife's Covenant to settle after-acquired Property — Construction—"Become entitled to any estate or interest"—Assignment of even Date by Wife—Ultimate Trust for Wife—Wife's Contingent Interest—Vesting in Possession during Coverture—Change of Interest — Operation of Covenant — Marriage Settlement.*

Upon attaining the age of twenty-one years in 1907, the plaintiff became absolutely entitled in possession to one-third of her parents' marriage settlement funds and was contingently entitled to a further one-third share in the same funds upon the death of either of her two younger brothers before attaining the age of twenty-one years.

In contemplation of her marriage in 1909 the plaintiff by deed assigned (inter alia) her one-third share of certain mortgage debts constituting part of her late mother's marriage settlement fund "and all other if any her share and interest in the said mortgage debts" to trustees upon trust after the marriage to raise thereout, and out of certain stocks, funds, and securities already transferred, the sum of 12,000*l.*, and subject thereto to stand possessed of the premises thereby assigned and the said stocks, funds, and securities in trust for the plaintiff absolutely. By her marriage settlement of even date the 12,000*l.* was settled upon the usual trusts of a wife's fund, and the plaintiff thereby covenanted with the trustees that if she should at any time during the intended coverture "become entitled in any manner and for any estate or interest" to any real or personal estate exceeding in value 500*l.* at one time and from one and the same source (except as therein mentioned) she would convey the same to the trustees upon trust to sell and convert (a reversionary interest not to be sold except for special reason before it fell into possession) and to hold the proceeds upon the trusts of the wife's fund.

Her younger brother Francis died under the age of twenty-one years shortly after the plaintiff's marriage:—

Held, (1.) on the authority of *In re Holford,* [1894] 3 Ch. 30, that the plaintiff's interest on attaining twenty-one in the shares to which her younger brothers were entitled contingently on their attaining twenty-one in their parents' marriage settlement funds was a contingent and not a vested interest.

(2.) That the plaintiff's contingent interest in Francis's share of the mortgage debts passed by the assignment to the trustees, and that, subject to raising the 12,000*l.*, the moneys representing such share were payable to the

SETTLEMENT—*continued.*

plaintiff unaffected by her covenant, which must be read and construed in the light of the trusts contained in the assignment of even date and not so as to defeat those trusts; and

(3.) On the authority of *Archer* v. *Kelly*, (1860) 1 Dr. & Sm. 300, that the plaintiff's share in her parents' marriage settlement funds (other than the mortgage debts) which fell into possession on her brother Francis's death was caught by the covenant in her settlement. *In re* WILLIAMS' SETTLEMENT. WILLIAMS *v.* WILLIAMS – – **Eve J. 441**

—— Annuity.
See under ANNUITY.

—— Settled land.
See under SETTLED LAND.

—— Trustee, Public—Appointment by Court —Sole trustee—Provision as to number of trustees being not less than three – – – – – **611**
See TRUSTEE. 5.

—— Will—Construction.
See under WILL.

SEWAGE—River—Pollution of—Discharge of sewage on land of riparian owner—Injury to reversion – – – **393**
See RIVER.

SHAREHOLDERS AND SHARES—Company.
See under COMPANY.

SHORTHAND NOTES—Costs of—Joint note—Costs in the cause – – – **393**
See RIVER.

SOLICITOR—*Agreement of Service—Restrictive Undertaking—Carrying on the Profession of a Solicitor — Construction — Breach — Letter written outside the prohibited Area to a Person within it—Injunction.*

The defendant, an admitted solicitor, signed an agreement of service with the plaintiffs, a firm of solicitors carrying on business in London and at Brentford, whereby, in consideration of their employing him as their conveyancing clerk and representative advocate at Brentford at a stated salary, the defendant undertook that he would not, at any time during his employment, or after the determination thereof, "carry on within a radius of five miles of the town hall, Brentford, the profession of a solicitor." After the termination of the engagement the defendant, who had started business as a solicitor in London, wrote from his office in London, on behalf of a client residing within the prescribed radius, to a person also residing within the radius, demanding payment of a debt due to his client. The recipient of the letter, who was not in fact the debtor, as the result of the correspondence which ensued, bought up the debt, and the defendant, who acted as solicitor for both parties, received a payment for his services. Upon motion for an interlocutory injunction to restrain the defendant from infringing the restrictive condition :—

Held (reversing the decision of Eve J.),

SOLICITOR—*continued.*

that there had been no breach of the agreement and that an injunction ought not to be granted. WOODBRIDGE & SONS *v.* BELLAMY **C. A. 326**

—— Misappropriation — Trustee — Breach of trust—Liability—"Honestly and reasonably" – – – – – **300**
See TRUSTEE. 2.

—— Trustee—Breach of trust—Authority to solicitor to receive trust moneys — Knowledge as to solicitor's unreliability – – – – – **50**
See TRUSTEE. 1.

SPECIFIC LEGACY—Residue—Distinct trusts—Default in respect of residue – **662**
See TRUSTEE. 7.

—— Will—Part of specific legacy applied in payment of debt—Marshalling—Compensation out of residuary estate **277**
See WILL. 7.

SPECIFIC PERFORMANCE—Latent defect in property sold — Underground watercourse — Specific performance with compensation – – – – **521**
See VENDOR AND PURCHASER.

STAIRCASE—Overlooking bedroom—Privacy—Comfort—Quiet enjoyment—Derogation from grant – – – **219**
See LANDLORD AND TENANT.

STATUTES:—

1623.

21 Jac. 1, c. 16—*Limitation* – – – **502**
See LIMITATIONS, STATUTE OF.

1736.

9 Geo. 2, c. 36—*Mortmain* – – – **179**
See CONFLICT OF LAWS. 2.

1738.

12 Geo. 2, c. 26, ss. 2, 6—*Plate (Offences)* – **286**
See PLATE.

1797.

38 Geo. 3, c. 5, ss. 4, 17—*Land Tax* – – **467**
See LAND TAX.

1802.

42 Geo. 3, c. 116, ss. 8, 38—*Land Tax Redemption* – – – – **467**
See LAND TAX.

1837.

1 Vict. c. 26, s. 27—*Wills* – – – – **151**
See POWER OF APPOINTMENT. 3.

—— —— s. 33 – – – – **246, 358**
See WILL. 1, 5.

1842.

5 & 6 Vict. c. 47, s. 59—*Customs* – – **286**
See PLATE.

1845.

8 & 9 Vict. c. 18, ss. 18, 68, 84, 85, 124—*Lands Clauses* – – – – – **604**
See TRAMWAYS. 1.

STATUTES—*continued.*

1862.

25 & 26 Vict. c. 68, ss. 1, 4, 6, 11—*Fine Arts Copyright* – – – – **386**
See COPYRIGHT.

1870.

33 & 34 Vict. c. 35—*Apportionment* – – **455**
See WILL. 6.

1871.

34 & 35 Vict. c. 31, ss. 3, 4—*Trade Union* – **540**
See TRADE UNION.

1874.

37 & 38 Vict. c. 42, s. 40—*Building Societies* **698**
See BUILDING SOCIETY.

37 & 38 Vict. c. 57, s. 7—*Real Property Limitation* – – – – – – **698**
See BUILDING SOCIETY.

1875.

38 & 39 Vict. c. 55, ss. 17, 19, 21—*Public Health* – – – – – **393**
See RIVER.

—— —— s. 148 – – – – – **648**
See HIGHWAY.

1878.

41 & 42 Vict. c. 31, ss. 3, 4—*Bills of Sale* **282**
See BILL OF SALE.

1881.

44 & 45 Vict. c. 21, ss. 6, 7, 8—*Married Women's Property (Scotland)* – – – **578**
See CONFLICT OF LAWS. 1.

1882.

45 & 46 Vict. c. 38, s. 2, sub-ss. 5, 7, 10; s. 58, sub-s. 1, cl. vi.—*Settled Land* – **451**
See SETTLED LAND. 3.

—— —— s. 21, sub-s. (ii.) – – – **648**
See HIGHWAY.

—— —— s. 36 – – – – – **370**
See SETTLED LAND. 2.

—— —— ss. 39, 45 – – – – **611**
See TRUSTEE. 5.

—— —— s. 53 – – – – – **351**
See SETTLED LAND. 1.

—— —— s. 58, sub-s. 1, clauses (vi.), (ix.) **315**
See SETTLED LAND. 4.

45 & 46 Vict. c. 43, ss. 3, 8—*Bills of Sale* – **282**
See BILL OF SALE.

1883.

46 & 47 Vict. c. 52, s. 44, sub-s. 2; s. 50, sub-s. 5—*Bankruptcy* – – – – **687**
See BANKRUPTCY.

46 & 47 Vict. c. 55, s. 10—*Revenue* – – **286**
See PLATE.

1888.

51 & 52 Vict. c. 41, s. 62—*Local Government* **229**
See HOSPITAL.

STATUTES—*continued.*

1890

53 & 54 Vict. c. 23, ss. 3, 4, 5—*Chancery of Lancaster* – – – – – **731**
See LANCASTER PALATINE COURT.

1893.

56 & 57 Vict. c. 53, ss. 8, 9—*Trustee* – – **758**
See TRUSTEE. 4.

—— —— ss. 10, 25 – – – – – **611**
See TRUSTEE. 5.

—— —— s. 17, sub-ss. 1, 3 – – – **50**
See TRUSTEE. 1.

56 & 57 Vict. c. 73, s. 25—*Local Government* **648**
See HIGHWAY.

—— —— s. 25 – – – – – **393**
See RIVER.

1894.

57 & 58 Vict. c. 30, ss. 1, 6, sub-s. 2; s. 8, sub-s. 3; s. 9, sub-ss. 1, 4—*Finance* **188**
See REVENUE. 3.

—— —— s. 2, sub-s. 1; s. 6, sub-s. 2; s. 9, sub-s. 1; s. 22, sub-s. 2 (*a*) – – **206**
See REVENUE. 2.

—— —— s. 14, sub-s. 1 – – – – **459**
See REVENUE. 1.

1896.

59 & 60 Vict. c. 35, s. 3—*Judicial Trustees* **300, 758**
See TRUSTEE. 2, 4.

1897.

60 & 61 Vict. c. 65, s. 16, sub-s. 2—*Land Transfer* – – – – – **42**
See LAND TRANSFER.

1900.

63 & 64 Vict. c. 51, s. 1, sub-s. 5; s. 2, sub-s. 1 (*a*), (*c*)—*Money-lenders* – – **230**
See MONEY-LENDER.

1904.

4 Edw. 7, c. 6, s. 1—*Hall-marking of Foreign Plate* – – – – – **286**
See PLATE.

1906.

6 Edw. 7, c. 55, s. 5, sub-ss. 1, 3—*Public Trustee* **611**
See TRUSTEE. 5.

—— —— ss. 10, 13 – – – – **532**
See TRUSTEE. 6.

1907.

7 Edw. 7, c. 24—*Limited Partnerships* – **342**
See PARTNERSHIP. 1.

7 Edw. 7, c. 29, ss. 21, 22, 23—*Patents and Designs* – – – – – **514**
See PATENT. 1.

—— —— s. 25, sub-s. 2; s. 27 – – **66**
See PATENT. 3.

—— —— s. 26 – – – – – **60**
See PATENT. 2.

—— —— s. 27, sub-s. 1 – – – – **754**
See PATENT. 4.

7 Edw. 7, c. 47, ss. 1, 2—*Deceased Wife's Sister's Marriage* – – – – – **310**
See HUSBAND AND WIFE.

STATUTES—*continued.*

1908.

8 Edw. 7, c. 69, ss. 81, 285—*Companies (Consolidation)* - - - - **573**
See COMPANY. 6.

—— —— s. 268, sub-s. 1, cl. vii. - - **342**
See PARTNERSHIP. 1.

SURETY—Principal and.
See under PRINCIPAL AND SURETY.

TENANT—Landlord and.
See under LANDLORD AND TENANT.

TENANT FOR LIFE—Settled land.
See under SETTLED LAND.

TENANT IN TAIL—Minority of—Trustees to enter—Omission of words "by purchase" — Perpetuities — Implied estate — Destructibility — Antecedent estate - - - - **255**
See WILL. 4.

TIME—Limitations, Statute of.
See under LIMITATIONS, STATUTE OF.

TITHE RENT-CHARGE—Net or gross rents—Arrears of rent—Accruing rent **455**
See WILL. 6.

TRADE—Restraint of.
See under RESTRAINT OF TRADE.

TRADE UNION — *Ultra vires — Expulsion of Member—Action for Rescission of Resolution —Illegal Association—Restraint of Trade—Jurisdiction—Enforcing Agreement "for application of funds to provide benefits to members"—Trade Union Act,* 1871 (34 & 35 *Vict. c.* 31), *ss.* 3, 4.

The plaintiff, who was a member of the defendant society, a trade union, and had been expelled therefrom by a resolution of the executive committee, brought an action to obtain reinstatement as a member on the ground that his expulsion was ultra vires and void. The defendants took the preliminary objection that the society was at common law an illegal association, and further that having regard to s. 4, sub-s. 3 (*a*), of the Trade Union Act, 1871, the action was not maintainable, being "instituted with the object of directly enforcing any agreement for the application of the funds of a trade union to provide benefits to members." The rules of the society provided that the executive committee could only sanction, as distinct from ordering, a strike, and any member striking without such sanction was not entitled to strike pay. Under certain circumstances the committee were empowered to issue notice papers to the men for signature and, if signed by two-thirds of the men, to fix a day for handing the same to the employers, and if a strike ensued the committee were to assist the men in the struggle. The committee had power to expel a member found guilty of attempting to injure the society or break it up otherwise than as allowed by the rules. Apart from this the rules did not provide that when a strike was sanctioned by the committee every member

TRADE UNION —*continued.*

was bound to strike, nor did they prevent members who had struck from resuming work if they pleased:—

Held, (1.), on construction, that the rules were not in restraint of trade, and that the society was a lawful association at common law; (2.), distinguishing *Rigby* v. *Connol,* (1880) 14 Ch. D. 482, and *Chamberlain's Wharf, Ld.* v. *Smith,* [1900] 2 Ch. 605, that the action was not a proceeding instituted with the object of directly enforcing an agreement for the application of the funds of the union "to provide benefits to members"; and consequently that the action was maintainable.

Decision of Warrington J. reversed. OSBORNE *v.* AMALGAMATED SOCIETY OF RAILWAY SERVANTS - - - - - **C. A. 540**

TRAMWAYS—*Lands Clauses Acts—Notice to Treat not served on Mortgagee — Possession taken by Promoters — Subsequent Notice to Treat to Mortgagee—Lands Clauses Consolidation Act,* 1845 (8 & 9 *Vict. c.* 18), *ss.* 18, 68, 84, 85, 124.

The London County Council was empowered by statute to reconstruct certain tramways and to acquire lands for the purposes of the statute, which incorporated the material provisions of the Lands Clauses Act, 1845.

Land required for the purposes of the council's Act belonged to E., to whom the council gave notice to treat under s. 18 of the Act of 1845. In answer to inquiries whether the land was mortgaged C. gave the dates of two mortgages on the property and the amounts thereby secured, but declined to disclose the names of the mortgagees. The council proceeded under the notice to treat and a jury assessed the compensation. C., one of the mortgagees, refused to be bound by the jury's finding, and the council thereupon served her with notice to treat under s. 18 of the Act of 1845. C. then brought an action against the council and E., alleging that the council had taken possession of the land, and claiming an account of what was due under her mortgage, damages for injuries to the property, and an injunction. The council then gave C. notice to proceed to assess the compensation payable under the notice to her to treat, and she applied for an interlocutory injunction to restrain the council from proceeding to summon a jury or otherwise proceeding on their notice to her to treat:—

Held, that, assuming the council had taken possession of the property, that fact did not preclude them from their statutory right to give notice to treat to C., and that the injunction must be refused. COOKE *v.* LONDON COUNTY COUNCIL - - - **Parker J. 604**

2. —— *Parliamentary Deposit — Tramway Company — Abandonment of Undertaking — Diminution in Value of Land—Compensation to Landowner — Collateral Obligation — Covenant to make Embankment—Breach not necessary Result of Abandonment of Undertaking.*

A company was authorized by Act of Parliament to construct a tramroad, which would

TRAMWAYS—*continued.*

cross land belonging to the respondent, "with all necessary and proper embankments," &c. By s. 50 of the Act it was provided that the deposit made upon the application for the Act, in pursuance of the Standing Orders and the Parliamentary Deposits Act, 1846, should, in the event of the tramroad not being completed, be applicable to (inter alia) compensation "to landowners and other persons whose property has been interfered with or otherwise rendered less valuable by the commencement, construction or abandonment of the tramroad" authorized by the Act. The company, in pursuance of the terms of an agreement made by them with the respondent before the passing of the Act, subsequently thereto entered into an agreement with him by which the respondent agreed to convey certain lands to the company, and to grant to them by way of easement the right of constructing and maintaining upon certain marsh lands belonging to him "a solid embankment for the purpose of carrying the company's authorized tramroad across the marsh lands," and the company agreed to "construct and thereafter maintain the embankment for the purpose of carrying the tramroad across the marsh lands in manner aforesaid" as a solid embankment, and to form it so as to connect certain existing sea banks, and to be sufficient to prevent the ingress of the tidal waters of a river over land belonging to the respondent. This agreement was followed by a conveyance by which the before-mentioned easement was granted to the company and which contained a covenant by the company to execute and perform the works specified in the agreement. The proposed tramroad was never made, and the company obtained an Act by which it was provided that they should abandon the same, and provision was made for the appointment of a liquidator and the winding-up of the company. In proceedings in the Chancery Division in the matter of the application of the deposit fund the respondent claimed against that fund in respect of diminution of the value of his property by the abandonment of the company's undertaking, and the consequent non-construction of the embankment, which would have protected his above-mentioned land from liability to be overflowed by the tidal water, and Warrington J., being of opinion that the respondent was a landowner whose land had been rendered less valuable by the abandonment of the company's tramroad within the meaning of s. 50 of the Act, allowed him to claim against the fund. On appeal by the liquidator of the company:—

Held, reversing the decision of the learned judge, that the non-construction of an embankment in accordance with the covenant was not a necessary consequence of the abandonment of the company's undertaking, and, therefore, the respondent was not entitled to compensation out of the deposit fund as claimed by him.

The doctrine of *In re Ruthin and Cerrig-y-Druidion Railway Act,* (1886) 32 Ch. D. 438, applied. *In re* SOUTHPORT AND LYTHAM TRAMROAD ACT, 1900. *Ex parte* HESKETH
C. A. 120

TRANSFER—Land transfer.
See under LAND TRANSFER.

TRUSTEE — *Breach of Trust—Authority to Solicitor to receive Trust Moneys—Permitting Retainer for unreasonable Time—Knowledge as to Solicitor's Unreliability — Trustee Act,* 1893 (56 & 57 *Vict. c.* 53), *s.* 17, *sub-ss.* 1, 3.

In order to bring into operation s. 17, sub-s. 3, of the Trustee Act, 1893 (which provides that nothing in the section is to exempt a trustee from any liability which he would have incurred if the Act had not been passed, in case he permits money, received by a solicitor under a deed containing a receipt for the money, to remain in the latter's hands or under his control for a period longer than is reasonably necessary to enable him to pay the same to the trustee), the circumstances must be such that the trustee either knew or ought to have known of the receipt of the money.

X. and Y., who were trustees, were in July, 1902, told by B., their solicitor, that a mortgage forming part of the trust property would shortly be paid off and that the mortgage money would be placed to the joint account of the trustees at a bank, and they accordingly sent to B. a reconveyance of the mortgaged property (which contained in the body of it a receipt for the mortgage money) executed by them. B. then proceeded, on the mortgagors' behalf, to sell the property in lots, and he from time to time received the purchase-money for the lots, which money he ultimately misappropriated; but before any of the money had been received by B., X. died. Y. trusted in B.'s honesty and bona fide believed him to be a proper person to be entrusted with the mortgage money, and did not before December 4, 1902, know that B. had received any of the money. In the meantime Y. frequently inquired of B. whether he had received the money and was told by him that he had not received it. By December 4, 1902, it had become impossible to recover the money which B. had received.

The case was argued on the footing that the authority conferred by the reconveyance justified the receipt by B. by instalments and that the death of X. before any money was received by B. did not affect the question of Y.'s liability:—

Held (without deciding that the case had been argued on the proper footing but on the assumption that it had been so argued), that Y. was not liable to replace the misappropriated trust funds.

Quære, whether the death of X. revoked the authority conferred on the solicitor by the delivery to him of the reconveyance.

Quære, whether that delivery justified the receipt of the mortgage money by instalments.

The question under what circumstances

a trustee ought to regard a solicitor as an unreliable person to receive trust moneys considered. *In re* SHEPPARD. DE BRIMONT *v.* HARVEY – – – – **Parker J. 50**

2. —— *Breach of Trust—Will—Power to employ Agents—Payment of Duty—Cheque payable to Solicitor—Misappropriation—Liability—"Honestly and reasonably"—Judicial Trustees Act,* 1896 (59 & 60 *Vict. c.* 35), *s.* 3.

The testator gave his property to the defendant and another as executors and trustees and declared that they might employ agents to act for them under his will and that each of them should be indemnified out of the trust estate against the acts and omissions of such agents. The second trustee was a solicitor and managed the estate whilst the defendant looked after the testator's business. The solicitor trustee died, and the defendant instructed another firm of solicitors to act for the estate. The defendant kept the trustees' cheque-book, and at the new solicitor's request he signed cheques payable to him for considerable sums which were said to be wanted for payment of death duties. The solicitor misappropriated the proceeds of these cheques, and the beneficiaries took proceedings to make the defendant liable for the amount thus lost to the estate:—

Held, that the defendant was justified in believing that, having regard to the terms of the will, he might safely pay the money to the solicitor; that he had acted honestly and reasonably, and ought to be excused under s. 3 of the Judicial Trustees Act, 1896. *In re* MACKAY. GRIESSEMANN *v.* CARR

Parker J. 300

3. —— *Indemnity—Change of Cestui que Trust—Novation of Right to Indemnity.*

Although the assignment by a cestui que trust of his absolute beneficial interest to a new cestui que trust terminates the trust relationship between the trustee and the old cestui que trust, it does not terminate the personal liability of the old cestui que trust to indemnify the trustee against contingent claims that may arise under existing contractual liabilities, and the mere fact that the trustee concurs and takes an indemnity from the new cestui que trust against those liabilities does not in itself amount to novation.

In 1879 two partners in a firm took an onerous lease on behalf of and as trustees for the partnership and entered into joint covenants with the lessors.

On November 15, 1886, all the original partners, including the two trustees, entered into an agreement to transfer the assets and liabilities to a limited company. The company agreed to indemnify them against the partnership liabilities and to take all reasonable steps in their power to bring about a novation to the company of all liabilities of the partnership and a release therefrom of the partnership and the several partners.

On November 27, 1886, one trustee died.

On November 4, 1887, the surviving trustee in pursuance of the agreement assigned the lease to the company on the usual covenant for indemnity. About the same time he also conveyed other freehold and leasehold partnership property to the company in pursuance of the agreement, without reserving any part to cover the indemnity.

On February 18, 1891, the surviving trustee died.

In 1909, the company having made default, the surviving trustee's executors were compelled to pay 5874*l.* for arrears of rent, breach of covenants of the lease, and costs:—

Held, that neither the agreement, nor the assignment and conveyances in pursuance thereof, nor the change of the trust relationship thereby effected, amounted to any novation of the surviving trustee's original right to indemnity and contribution against the partners, and his executors were therefore entitled to enforce this right against the partners or their estates.

Jervis v. *Wolferstan,* (1874) L. R. 18 Eq. 18, 24; *Fraser* v. *Murdoch,* (1881) 6 App. Cas. 855, 872; and *Hardoon* v. *Belilios,* [1901] A. C. 118, 123, applied. MATTHEWS *v.* RUGGLES-BRISE – – **Swinfen Eady J. 194**

4. —— *Investment—Breach of Trust—Insufficient Security—Mortgage—Trade Buildings — Advance of more than one half the Value—No independent Valuation—Trustees acting "reasonably"—Trustee Act,* 1893 (56 & 57 *Vict. c.* 53), *ss.* 8, 9—*Judicial Trustees Act,* 1896 (59 & 60 *Vict. c.* 35), *s.* 3.

There is no fixed rule that in all cases where a portion of the premises upon which mortgage money is lent is utilized for business purposes, trustees would be guilty of a breach of trust in advancing more than a moiety of the value of the property; but if the mortgaged premises and the business are so inseparable that the discontinuance of the business may result in depreciation of the premises, trustees ought not to advance more than one half.

Sect. 8 of the Trustee Act, 1893, is a relieving section, and does not impose a statutory obligation upon trustees to take a valuation, and the neglect to do so does not exclude them from the benevolent operation of s. 3 of the Judicial Trustees Act, 1896.

In April, 1899, the trustees of a settled legacy of 3500*l.* invested this trust money upon mortgage of two blocks of freehold house property in Norwich, a portion of the premises being used for the purposes of a butcher's business of forty years' standing. A bank had previously allowed an overdraft of 6000*l.* upon the security of a deposit of the title deeds of the same property.

No independent valuation was made on behalf of the trustees at the time of making the advance. They relied upon a valuation made in September, 1896, for a different purpose, by a highly skilled valuer at Norwich, who valued the whole of the premises at 6550*l.* The butcher's business subsequently failed, and the premises became much depreciated in value

and wholly insufficient to pay the settled legacy.

In an action by the beneficiaries under the settlement seeking to make the trustees liable for a breach of trust in investing upon an insufficient security :—

Held, on the evidence, that the value of the property at the time of the advance in 1899 was 5500*l.*, and having regard to all the circumstances which the trustees were entitled to take into consideration, they were justified in lending more than one half the value upon the portion used for business purposes, in order to make up the full loan of 3500*l.*, and were not liable for a breach of trust.

Held, further, that, even assuming that they had advanced a larger sum than was justifiable, they had acted reasonably within the Judicial Trustees Act, 1896, s. 3, and should be relieved from liability. PALMER *v.* EMERSON – – – – – **Eve J. 758**

5. —— *Public Trustee — Appointment by Court—Sole Trustee—Settlement—Provision as to Number of Trustees being not less than three—Trustee Act,* 1893 (56 *&* 57 *Vict. c.* 53), *ss.* 10, 25—*Public Trustee Act,* 1906 (6 *Edw.* 7, *c.* 55), *s.* 5, *sub-ss.* 1, 3—*Settled Land Act,* 1882 (45 *&* 46 *Vict. c.* 38), *ss.* 39, 45.

The Court has express jurisdiction, under s. 5 of the Public Trustee Act, 1906, to appoint the Public Trustee sole trustee of a settlement, although it contained a provision that the trustees should not at any time be less than three.

Semble, under the combined effect of s. 10 of the Trustee Act, 1893, and s. 5 of the Public Trustee Act, 1906, the donee of the power in a settlement containing such a provision could himself appoint the Public Trustee to be sole trustee.

In cases where such an appointment has been made under the Court's statutory power of appointing new trustees, the settlement must be read as authorizing the payment to a sole trustee of capital moneys under the Settled Land Acts.

Notwithstanding the absence of any express statutory enactment enabling the Public Trustee to hold land or take possession of personal property except as provided in s. 3 of the Act of 1906, it must be implied that he has full power, when appointed, to possess himself of the trust property, whatever its nature.

Semble, under s. 25 of the Trustee Act, 1893, the Court has jurisdiction to appoint two trustees, or even a sole trustee, of a settlement, in disregard of the settlor's direction as to the minimum number being three. *In re* LESLIE'S HASSOP ESTATES – **Eve J. 611**

6. —— *Public Trustee — Audit of Trust Accounts—Appeal from Direction as to Costs—Public Trustee Act,* 1906 (6 *Edw.* 7, *c.* 55), *ss.* 10, 13.

Where the Public Trustee directs that the costs of an audit of trust accounts under s. 13 of the Public Trustee Act, 1906, shall be paid otherwise than out of the trust estate, the person ordered to pay the costs can appeal to the Court, under s. 10 of the Act, from his decision.

Sect. 10 of the Act applies to all decisions of the Public Trustee in discharge of his judicial functions under the Act.

Before making an order for payment of the costs of an audit under s. 13 of the Act otherwise than out of the trust estate the Public Trustee should hear the parties if they desire to be heard.

The Public Trustee ought not to be joined as a party to proceedings by way of appeal from his decision in discharge of his judicial functions.

Quære, whether an appeal does not lie from every act or omission of the Public Trustee in the performance of his administrative functions under the Act. *In re* ODDY **Parker J. 532**

7. —— *Specific Legatee—Residue—Distinct Trusts—Default in respect of Residue—Making good Default — Assignees from Trustee — Specific Legacy not liable.*

An executor and trustee, who was absolutely entitled to a specific legacy subject only to prior life interests therein, was also trustee of the residuary personal estate, which was settled upon trusts under which he took no beneficial interest whatever. He settled part of the legacy while still reversionary and mortgaged the other part. Several years afterwards he misappropriated part of the residue. The legacy having fallen into possession and been transferred into Court in the course of an action for the execution of the trusts of the will, the residuary legatees sought to attach the legacy to make good the default in respect of the residue :—

Held, that the rule that a defaulting trustee cannot claim any share in the trust estate until he has made good his default, inasmuch as he must be treated as having by anticipation received or retained payment of his share, did not apply to the present case, because the trustee was not entitled to any share or interest in the residue ; and that, as the specific legacy and residue were held upon entirely distinct trusts, one fund was not liable to indemnify the other, and the trustee's assignees were, therefore, entitled to the whole legacy free from any lien or equity in respect of the default. *In re* TOWNDROW. GRATTON *v.* MACHEN – – – – **Parker J. 662**

—— Partnership — Mortgage by partners of real estate—Death of partners—Covenant by trustees—Effect – – **414**
See COVENANT. 2.

—— Public Trustee—Trust fund—Payment by trustee to wrong cestui que trust—Mistake of fact—Lapse of time – **502**
See LIMITATIONS, STATUTE OF.

—— Settled land.
See under SETTLED LAND.

TRUSTEE—*continued.*

—— Waiver—Market rights—Local Act **375**
See MARKET.

—— Will—Construction—Minority of tenant in tail—Trustees to enter—Omission of words "by purchase"—Perpetuities—Implied estate — Destructibility — Antecedent estate - - - **255**
See WILL. 4.

TRUSTEE IN BANKRUPTCY.
See under BANKRUPTCY.

ULTRA VIRES—Trade union — Expulsion of member—Action for rescission of resolution — Illegal association—Restraint of trade—Jurisdiction - **540**
See TRADE UNION.

UNDERGROUND RAILWAY.
See under RAILWAY.

UNDERGROUND WATERCOURSE.
See under WATERCOURSE.

UNDISCHARGED BANKRUPT.
See under BANKRUPTCY.

VENDOR AND PURCHASER — *Latent Defect in Property sold—Underground Watercourse—Specific Performance with Compensation.*

Where there is a latent defect in property which is the subject of a contract of sale, but the defect is not so material as to bring the case within the principle of *Flight* v. *Booth*, (1834) 1 Bing. N. C. 370, the purchaser is not entitled to have the contract rescinded, even if the defect is known to and not disclosed by the vendor.

Carlish v. *Salt*, [1906] 1 Ch. 335, distinguished.

A contract was entered into for the sale of a house and lands adjoining described as a "residential property," but which in fact possessed advantages for the formation of building sites. The contract stated that the property was sold subject to all drainage, sewer, and other easements (if any) affecting the same, and (clause 11) that if any error or misstatement in the particulars or contract should be disclosed, the same should not annul the sale, nor should any compensation be claimed or made in respect thereof by either party. Neither the particulars nor contract, nor the plan annexed, disclosed or indicated the existence of a natural underground watercourse which ran through the grounds and the lands of adjoining owners in a culvert or piping constructed by the owners of the several lands. The vendors, knowing of the existence of the watercourse, did not disclose it to the purchaser, and the purchaser's agents, when inspecting the property prior to the contract, did not see the piping, although it was then exposed to view in a hole in the lawn of the house. The purchaser bought the property primarily as a residence, but with a view in certain events to using it for building purposes. In an action by the vendors for specific performance they waived clause 11 of the contract:—

Held, that the watercourse was not a sewer or drain vested in the local authority, nor an easement affecting the property, nor a defect in title, but that it was a latent defect in the property, although not of such materiality as would prevent the purchaser from getting substantially what she had contracted for if the contract was specifically enforced against her; and that the vendors were entitled to specific performance subject to their paying compensation to the purchaser for the defect by reason of the existence of the watercourse. SHEPHERD *v.* CROFT - - **Parker J. 521**

VENDOR AND PURCHASER—*continued.*

WAIVER—Market rights—Trustees—Local Act
See MARKET. **375**

WAREHOUSE—Market rights—Disturbance—Rival market—"Own shop or shops"—Local Act - - - - **375**
See MARKET.

WATERCOURSE—Latent defect in property sold — Underground watercourse — Specific performance with compensation- - - - - - **521**
See VENDOR AND PURCHASER.

WIDOWHOOD—Gift of income during widowhood — Subsequent marriage with deceased sister's husband — Effect of marriage being validated by statute - - - - - **310**
See HUSBAND AND WIFE.

—— Limited owner—Widow entitled to surplus rents during widowhood—"Forfeiture" - - - - - **315**
See SETTLED LAND. 4.

WIFE—Husband and.
See under HUSBAND AND WIFE.

WILL — *Class — Collaterals — Death before Testator—Attempt to include Persons who predecease Testator leaving Issue living at Period of Distribution—Wills Act*, 1837 (1 *Vict. c.* 26), *s.* 33.

In exercise of a general testamentary power a testatrix appointed trust funds to a class of collaterals who should be living at the period of distribution and by language similar to s. 33 of the Wills Act, 1837, attempted to include in the class persons who should predecease her leaving issue living at the period of distribution:—

Held, that, s. 33 being inapplicable to gifts to collaterals, persons who predeceased the testatrix and left issue living at the period of distribution were not effectively included in the class, and, there being no substitutionary gift to their legal personal representatives, their estates were not entitled to share. *In re* GRESLEY'S SETTLEMENT. WILLOUGHBY *v.* DRUMMOND - - - **Swinfen Eady J. 358**

WILL—*continued.*

2. —— *Devise of Real Estate — Trust to apply Net Rents in discharge of Mortgages and then sell—Gift of Proceeds to unascertained Class—Remoteness.*

The testator devised all his real estate to his executors upon trust to receive the rents and, after paying thereout all rates, taxes, and outgoings and the cost of repairs, to pay off all mortgage charges existing on the real estate held by a certain named building society or others, and upon further trust when all the real estate should be clear of all charges to sell the same and divide the proceeds amongst all his children and issue then living in manner therein mentioned, and he gave and devised all the residue of his estate to his children equally.

The testator died in 1909, leaving children and grandchildren surviving him. His real estate, consisting entirely of house property, was subject to two mortgages to the building society, in the usual form of such mortgages, to secure 1000*l.* and 225*l.* respectively, payable by monthly instalments with interest. It appeared from the evidence that if the instalments were duly and regularly paid and the terms of the mortgage deeds complied with the larger mortgage would be completely discharged in 1927, and the smaller in 1921 :—

Held, that the earlier devise of the real estate was void for remoteness, and that the real estate passed under the gift of residue.

In re Wood, [1894] 3 Ch. 381, applied. *In re* BEWICK. RYLE *v.* RYLE - **Eve J. 116**

3. —— *Infant—Contingent Legacy by Parent—Contingency not referable to Attainment of full Age—Interest—Maintenance—General Rule—Share of Residue.*

The testator bequeathed to each son of his living at his death who should attain the age of twenty-five years the sum of 15,000*l.*, and a further sum of 15,000*l.* to each such son who should attain the age of thirty years. He directed his trustees to stand possessed of three fourteenth parts of his net residuary estate in trust for his son Frank in case and when he attained the age of twenty-one years, and provided that the said shares should not vest absolutely in him, but should be held in trust for him for life and after his death in trust for his children. Frank had only attained the age of thirteen years when his father died.

Upon a summons by the trustees to determine whether the legacies to Frank carried interest :—

Held, that, inasmuch as the legacies were made contingent upon events having no reference to the infancy of the legatee, the case fell within the general rule that contingent legacies do not carry interest while in suspense, and did not fall within the exception to that rule giving to an infant the interest on a legacy from a parent or person in loco parentis contingent upon the infant's attaining the age of twenty-one years or previous marriage ; and that consequently neither of the legacies carried interest.

WILL—*continued.*

In re Moody, [1895] 1 Ch. 101, applied. *In re* ABRAHAMS. ABRAHAMS *v.* BENDON **Eve J. 108**

4. —— *Minority of Tenant in Tail—Trustees to enter—Omission of Words "by purchase"—Receipt and Application of Rents—Surplus Rents to be applied to other Estates—Perpetuities — Implied Estate—Destructibility—Antecedent Estate—Will—Construction.*

The testator devised four estates, three of which he settled to uses in strict settlement under which an infant was now tenant in tail of the C. estate, and the rents and profits of the fourth estate were to be applied in discharging incumbrances on all the estates. The will contained a provision that if any person who, if this clause had not been inserted, would for the time being be entitled to the possession or receipt of the rents and profits of the C. estate as tenant for life or tenant in tail should be under the age of twenty-one years, then and in such case and as often as the same should happen the trustees of the will were to enter into the possession or receipt of the rents and profits of the estate, and should during the minority of such person keep up the house and manage the property, with power (inter alia) to hold manorial courts and accept surrenders of leases ; and should maintain the infant, and apply the surplus rents and profits in the same way as the rents of the fourth estate :—

Held, that the trustees had an implied estate anterior to and taking precedence of that of tenants in tail ; that this estate was not destructible and would last during the whole of the limitations contained in the will; that the whole clause was therefore void as infringing the rule against perpetuities ; but that the subsequent limitations were not affected.

Browne v. *Stoughton,* (1846) 14 Sim. 369, and *Turvin* v. *Newcome,* (1856) 3 K. & J. 16, followed. *In re* EARL OF STAMFORD AND WARRINGTON. PAYNE *v.* GREY **Warrington J. 255**

5. —— *Real and Personal Estate—Settlement Fund—Special Power—Absolute Interest in Default of Appointment—"Devise bequeath and appoint"—Trusts for Non-objects of Power—Power and Interest—Intention—Child en ventre sa mère—Wills Act,* 1837 (1 *Vict. c.* 26), *s.* 33.

By his "last will and testamentary appointment," the testator, a solicitor, made the following disposition :—"I devise all the remainder of my real estate and bequeath all my personal estate and by virtue of the provisions contained in the settlement executed upon my marriage I appoint the funds subject to the trusts thereof unto my trustees upon trust after payment of my just debts and funeral and testamentary expenses to divide the same equally between my five children"; and the testator directed the shares of two of his daughters to be held by his trustees upon the usual settlement trusts for the daughters

WILL—*continued.*

for life, with remainder to their children at twenty-one or marriage.

At the time of making his will the testator had under the trusts of his marriage settlement a testamentary power of appointment in favour of the children of the marriage over the funds settled by both his wife and himself, and the trust of the latter fund in default of appointment was for the testator, his executors, administrators, and assigns absolutely. On a summons to determine the effect of the above-mentioned disposition with regard to the testator's own marriage settlement fund and his residuary real and personal estate :—

Held, that the word "appoint" was not used in any narrow technical and restricted sense as merely exercising the special power of appointment, but that the words of disposition must be read together so as to effect the clear intention of the testator to deal with all the property in question as belonging to him absolutely.

Cox v. *Chamberlain,* (1799) 4 Ves. 631, applied.

After the testator's death a posthumous child was born to one of the residuary legatees who had died shortly before the testator :—

Held, that s. 33 of the Wills Act applied, and that the share passed under the legatee's will. *In re* GRIFFITHS' SETTLEMENT. GRIFFITHS *v.* WAGHORNE – – – **Joyce J. 246**

6. —— *Rent, Arrears of—Accruing Rent—Apportionment Act,* 1870 (33 & 34 *Vict. c.* 35) *—Tithe Rent-charge—Net or Gross Rents—Will—Construction.*

F., who was tenant for life of the P. settled estates, by her will bequeathed "to the person who upon my death shall become entitled in possession to the P. settled estates all arrears of rent in respect of the same estates which shall then be due to me." The testatrix died on March 4. By the custom of the estate the rents, though due according to the agreements quarterly, were collected half-yearly at Michaelmas and Lady Day :—

Held, that the bequest included not only all arrears due at the preceding Michaelmas and unpaid, but the rents due at Christmas and the apportioned part accrued from Christmas to the death ; that arrears of tithe rent-charge were also included ; and that the bequest carried the gross rents without any deductions for collection or outgoings. *In re* FORD. MYERS *v.* MOLESWORTH **Swinfen Eady J. 455**

7. —— *Specific Legacy — Part of Specific Legacy applied in Payment of Debt—Marshalling—Compensation out of Residuary Estate—Legacy contingent on Legatee's attaining twenty-one—Time at which Value to be ascertained—Legacy given to Trustee for Legatee —Income.*

B. gave all his shares in a company to his son if he had attained twenty-one at B.'s death, and if not to a trustee in trust to

WILL—*continued.*

transfer them to his son when he had attained twenty-one. The son was an infant at B.'s death. The executors with the sanction of the Court transferred some of the shares to a creditor in payment of a debt. The son afterwards attained twenty-one. The shares had fallen in value :—

Held, that the son was entitled to compensation out of B.'s residuary estate for the shares so transferred, but for the purpose of compensation the value of the shares must be ascertained as at the date when the son attained twenty-one.

Held, also, that it made no difference in this respect that the shares were given to a trustee and not directly to the son, and the son was entitled to the income received from the shares from the death. *In re* BROADWOOD. LYALL *v.* BROADWOOD – – **Neville J. 277**

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See under POWER OF APPOINTMENT.

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—— "Testamentary expenses" – **188, 206**
See REVENUE. 2, 3.

—— "Warehouse" – – – – **375**
See MARKET.

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